

No. 12003

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE METROPOLITAN FINANCE CORPORATION
OF CALIFORNIA, a corporation,

Appellant,

vs.

ELLSWORTH WOOD, Individually and as Executor
of the Estate of Elaine Shipp, Deceased,
Appellee.

TRANSCRIPT OF RECORD

Upon Appeal From the District Court of the United States
for the Southern District of California
Central Division

FILED

OCT 13 1948

PAUL P. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

MACFARLANE, SCHAEFER & HAUN

1150 Subway Terminal Building

Los Angeles 13, Calif.

For Appellees:

WATERS, ARDITTO AND WATERS

621 Roosevelt Building

727 West Seventh Street

Los Angeles 14, Calif. [1*]

In the District Court of the United States
Southern District of California

Central Division

No. 8130-WM

THE METROPOLITAN FINANCE CORPORATION
OF CALIFORNIA, a corporation,

Plaintiff,

vs.

ELLSWORTH WOOD, ELAINE SHIPP, JOHN DOE
and RICHARD ROE,

Defendants.

COMPLAINT CLAIM AND DELIVERY

(California Code of Civil Procedure, Sections 509 to 521)

Comes now the plaintiff and for cause of action against
the defendants, and each of them, alleges as follows:

I.

That the plaintiff at the times hereinafter mentioned
was, and now is, a foreign corporation, organized and
existing under and by virtue of the laws of the State of
Delaware and doing business in the State of California.

II.

That the defendants are residents of the County of
Los Angeles, State of California.

III.

Jurisdiction in this case is founded upon diversity of
citizenship and the amount in controversy. Plaintiff is

a citizen of the State of Delaware and the defendants are citizens of the [2] State of California. The matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars (\$3,000.00).

IV.

That the defendants, John Doe and Richard Roe, are fictitious persons whose true names are unknown to plaintiff and plaintiff asks leave that when said true names be ascertained the complaint be amended to show the said true names.

V.

That plaintiff is the owner of the following described personal property, to wit:

One Cadillac 5 passenger Sedan, 1947 Model, 8 cylinders, Motor Number 5420612, California State License Number 8S2223,

and is entitled to the possession of said automobile.

VI.

That the hereinabove described personal property is of the value of Four Thousand Dollars (\$4,000.00).

VII.

That plaintiff has demanded possession of the hereinabove described personal property, that the defendants have failed and refused to surrender possession to plaintiff.

VIII.

That the defendants, Ellsworth Wood, Elaine Shipp, John Doe and Richard Roe, do now unlawfully hold and

detain from the possession of the plaintiff the herein described personal property, to wit:

One Cadillac 5 passenger Sedan, 1947 Model, 8 cylinders, Motor Number 5420612, California State License Number 8S2223,

all of which is to the damage of plaintiff in the sum of Four Thousand Dollars (\$4,000.00), the value of the said personal property. [3]

Wherefore, plaintiff demands judgment against defendants for the recovery of possession of the herein described personal property or for the sum of Four Thousand Dollars (\$4,000.00), the value thereof, in case delivery cannot be had; for the costs of suit herein expended and such other and further relief as may be proper.

MACFARLANE, SCHAEFER & HAUN

By Dexter D. Jones

Attorneys for Plaintiff [4]

[Verified.]

[Endorsed]: Filed Apr. 14, 1948. Edmund L. Smith, Clerk. [5]

[Title of District Court and Cause]

ANSWER

Comes now Ellsworth Wood, one of the defendants above named, and answering the complaint on file herein admits, denies, and alleges as follows, to-wit:

I.

Defendant admits the allegations contained in Paragraphs II, III, VI and VII of the complaint on file herein.

II.

Defendant denies each and every, all and singular, specifically and particularly, each allegation, matter or thing alleged in Paragraphs I, V and VIII of the complaint on file here.

As a Further and Separate Answer to the Complaint on File Herein Said Defendant Alleges as Follows, to-wit: [6]

I.

That said defendant, Ellsworth Wood, is the owner of the following personal property, to-wit:

One Cadillac 5 passenger Sedan, 1947 Model, 8 cylinders, Motor Number 5420612, California State License Number 8S2223,

and was at all times mentioned in the complaint and now is entitled to the possession of said automobile.

II.

That Everett S. Shipp, the husband of defendant Elaine Shipp, gave the automobile described in Paragraph I of

defendant's affirmative answer herein, to said Elaine Shipp in March 1947. That at said Everett S. Shipp's request and for tax purposes said defendant Elaine Shipp, consented to have the certificate of ownership and the certificate of registration issued in the name of the plaintiff herein, The Metropolitan Finance Corporation of California, a corporation.

III.

That on April 4, 1948, defendant, Elaine Shipp, gave said automobile to defendant, Ellsworth Wood; that said Elaine Shipp reserved, for the remaining days of her life, to herself, at the time of making that gift, the use of said automobile; that ever since April 4, 1948, defendant, Ellsworth Wood, has been and now is the owner of said automobile.

Wherefore defendant, Ellsworth Wood, prays that the plaintiff above named take nothing by its action herein and that said defendant Ellsworth Wood, be given judgment for the return of possession of the said automobile, or for the sum of \$4000.00 the value thereof, in case delivery cannot be had. For costs of suit herein expended and for such other and further relief as may be proper.

WATERS, ARDITTO AND WATERS

By James J. Arditto

Attorneys for Defendant Ellsworth Wood [7]

[Verified.] [8]

[Affidavit of Service by Mail.]

[Endorsed]: Filed May 4, 1948. Edmund L. Smith, Clerk. [9]

[Title of District Court and Cause]

ANSWER

Comes now Elaine Shipp, one of the defendants above named, and answering the complaint on file herein admits, denies and alleges as follows, to-wit:

I.

Defendant admits the allegations contained in Paragraphs II, III, VI and VII of the complaint on file herein.

II.

Defendant denies each and every, all and singular, specifically and particularly, each allegation, matter or thing alleged in Paragraphs I, V and VIII of the complaint on file herein.

As a Further and Separate Answer to the Complaint on File Herein Said Defendant Alleges as Follows, to-wit: [10]

I.

That said defendant, Elaine Shipp, is the owner of the following personal property, to-wit:

One Cadillac 5 passenger Sedan, 1947 Model, 8 cylinders, Motor Number 5420612, California State License Number 8S2223,

and was at all times mentioned in the complaint and now is entitled to the possession of said automobile.

II.

That Everett S. Shipp, the husband of said Elaine Shipp, gave the automobile described in Paragraph I of defendant's affirmative answer herein, to said Elaine Shipp in March 1947. That at said Everett S. Shipp's

request and for tax purposes said defendant, Elaine Shipp, consented to have the certificate of ownership and the certificate of registration issued in the name of the plaintiff herein, The Metropolitan Finance Corporation of California, a corporation.

III.

That said Everett S. Shipp owns at least 85% of the stock of the Metropolitan Finance Corporation of California, a corporation.

That at all times since the purchase of the automobile described in Paragraph I of the affirmative answer herein the defendant, Elaine Shipp, has been in possession and control of said automobile; that at all of such times said defendant, Elaine Shipp, has been the owner of said automobile and no one has used said automobile except said defendant without said defendant's permission.

That on or about April 15, 1948, the plaintiff above named through the Office of the United States Marshal unlawfully seized said automobile and now unlawfully is holding and detaining from the said defendant, Elaine Shipp, the said automobile, to-wit:

One Cadillac 5 passenger Sedan, 1947 Model, 8 cylinders, Motor Number 5420612, [11] California State License Number 8S2223,

all of which is to the damage of said defendant, Elaine Shipp, in the sum of \$4000.00 the value of said automobile.

Wherefore defendant, Elaine Shipp, prays that the plaintiff above named take nothing by its action herein and that said defendant, Elaine Shipp, be given judgment for the return of possession of the said automobile, or for the sum of \$4000.00 the value thereof, in case delivery

cannot be had. For costs of suit herein expended and for such other and further relief as may be proper.

WATERS, ARDITTO AND WATERS

By James J. Arditto

Attorneys for Defendant Elaine Shipp [12]

[Verified.] [13]

[Affidavit of Service by Mail.]

[Endorsed]: Filed May 4, 1948. Edmund L. Smith, Clerk. [14]

[Title of District Court and Cause]

NOTICE OF MOTION TO REMAND OR DISMISS
ACTION

To: Messrs. Macfarlane, Schaefer and Haun and Dexter D. Jones, Attorneys for Plaintiff, above named.

Please take notice that on June 7, 1948, at 10:00 A. M., or as soon thereafter as counsel may be heard, at the United States Court House at Los Angeles, California, and in Court Room No. 2, of the above entitled court, I shall apply for an order remanding the above entitled cause to the Superior Court in and for the County of Los Angeles, State of California, or to dismiss said action.

I herewith serve upon you a copy of the motion which will be presented to the court at the time aforesaid.

WATERS, ARDITTO AND WATERS

By James J. Arditto

May 17, 1948. [15]

MOTION TO REMAND CAUSE TO SUPERIOR
COURT IN AND FOR THE COUNTY OF LOS
ANGELES, STATE OF CALIFORNIA, OR TO
DISMISS CAUSE

Defendants, Ellsworth Wood and Elaine Shipp, move to remand the above entitled cause to the Superior Court in and for the County of Los Angeles, State of California, or to dismiss the action on the ground that this court is without jurisdiction to hear and determine the cause.

This court is without jurisdiction in the following respects:

On March 8, 1948, Elaine Shipp filed her answer and cross-complaint in action number D 356410 pending in the Superior Court in and for the County of Los Angeles, State of California, wherein she alleged inter alia (paragraph IV of Cross-Complaint), that the Cadillac automobile (the replevin of which is sought herein) was the community property of Everett S. Shipp and Elaine Shipp, husband and wife. [16]

On March 9, 1948, Honorable Orlando H. Rhodes, Judge of said Superior Court, issued an order which, inter alia, restrained and enjoined Mr. Shipp from "interfering with Mrs. Shipp's use of a 1947 Cadillac."

An action to recover possession of an automobile and an action to determine interests of husband and wife in specific property are actions in rem. In the above entitled action, and in the said Superior Court action the essential and only issue (relative to the automobile) is that relating to title to a "thing", to-wit: an automobile. In both of said actions the parties are, in effect, asking for a quiet title decree.

The fact that Metropolitan Finance Corporation of California, an alleged corporation, is plaintiff herein is

immaterial to the issue at hand when it is pointed out that said alleged corporation is owned and controlled by Mr. Shipp and is a mere fiction under which Mr. Shipp does business.

In any event the issues in said action are identical and the action in the Superior Court in and for the County of Los Angeles, State of California, was commenced at least thirty-six (36) days before the above entitled action.

Attached hereto, as Exhibit A, in a Memorandum in support of this motion.

WATERS, ARDITTO AND WATERS

By James J. Arditto

Attorneys for Defendants

Dated: May 17, 1948. [17]

EXHIBIT A

MEMORANDUM IN SUPPORT OF MOTION TO REMAND OR TO DISMISS

As between the Federal and State Courts, the one which first acquires jurisdiction by actual or constructive possession of property is vested with power to hear and determine all controversies in respect thereof.

Princess Lida v. Thompson, 305 U. S. 456, 59 S. Ct. 275.

Penn. General Casualty Co. v. Pennsylvania, 294 U. S. 189, 55 S. Ct. 386.

United States v. Bank of New York, etc. Co., 296 U. S. 463, 56 S. Ct. 343.

Boston Acme Mines Corp. v. Salina Canyon Coal Co., 3 Fed. (2nd) 729, 733. [18]

[Affidavit of Service by Mail.]

[Endorsed]: Filed May 21, 1948. Edmund L. Smith, Clerk. [19]

[Title of District Court and Cause]

AFFIDAVIT IN SUPPORT OF MOTION TO
DISMISS OR REMAND

State of California

County of Los Angeles—ss.

James J. Arditto, being first duly sworn on oath, deposes and says:

That he is one of the attorneys for the defendants above named and that the following set forth herein is within his own personal knowledge.

That on the 4th day of March, 1948, Everett S. Shipp filed a complaint for divorce against Elaine Shipp in the Superior Court in and for the County of Los Angeles, State of California; that said action was numbered D 356410 by the County Clerk of said county; that a true and correct copy of said complaint is attached hereto as Exhibit A. [20]

That on the 8th day of March, 1948, Elaine Shipp filed an answer and cross-complaint in the said action in said Superior Court; that a true and correct copy of said answer and cross-complaint is attached hereto as Exhibit B.

That on the 9th day of March, 1948, the Honorable Orlando H. Rhodes, judge of said Superior Court signed an order restraining Mr. Shipp from, inter alia, "interfering with Mrs. Shipp's use of a 1947 Cadillac", a true and correct copy of said order is attached hereto as Exhibit C.

That on the 19th day of April, 1948, the Honorable Joseph W. Vickers, Judge of said Superior Court, directed the entry of an order providing, inter alia, that Mr.

Shipp be enjoined from interfering with Mrs. Shipp's use and enjoyment of the Cadillac automobile providing she should legally recover possession of same. This restraint was incorporated in Paragraph (12) (c) of a formal order which was signed by said Judge Vickers on May 14, 1948, a copy of said formal order is attached hereto as Exhibit D.

That the order of the Honorable Orlando H. Rhodes, Judge of said Superior Court, was in full force and effect at all times on and after March 9, 1948, to and including the 19th day of April, 1948, through the hour of about 3:30 P. M. Said order of March 9th, 1948, was then superseded by the order of May 14, 1948, which is attached hereto as Exhibit D.

That said order of March 9, 1948, was personally served on Everett S. Shipp on or about the 9th day of March, 1948; that said order of March 9, 1948, was in full force and effect on April 14th, 1948, the day the above entitled action was commenced in this court.

That defendants and cross-complainants' Exhibit B which is attached to the deposition of Everett S. Shipp which was commenced on May 5, 1948, discloses that Everett S. Shipp owns at least 76% of the stock of the plaintiff above named. A copy of said Exhibit [21] B is attached hereto as Exhibit E.

That the transcript of said deposition of Mr. Shipp discloses, at page 222, line 15, to page 224, line 15, that the following questions were asked of Mr. Shipp and Mr. Shipp gave the following answers:

"Q. Now, I notice in the minutes of the Metropolitan Finance Corporation of California of April 8, 1948, where the Cadillac came up again, and au-

thorization was given to go ahead and sue to replevin that automobile.

Who prepared those minutes?

A. Mr. Crooks.

Q. Do you know whether he made any notes of that meeting, or prepared the notes, or rather the minutes, from memory?

A. I don't know of that at all. I left the meeting. I was present at the beginning and advised them what was happening to their property, and that I was—that I had sued, and had been sued, excused myself from the meeting and left.

Q. Was that a regular meeting of the board of directors?

A. No, it wasn't.

Q. Who called the meeting together?

A. I notified Mr. Crooks to notify them two days in advance as required by the by-laws.

Q. Where was the meeting held?

A. Here at this office.

Q. Who was present other than the people noted in the minutes?

A. Other than the people noted in the minutes and Mr. Crooks—he is not a director—just the three directors, and I left the meeting, and left Mr. Crooks and the two directors present.

Q. Did you discuss taking that action with anybody?

A. No.

Q. You just decided it yourself?

A. What is that? [22]

Q. You just decided yourself to call the meeting; is that right?

Mr. Haley: Now, just a minute. As I understand it, there is an action pending in the Federal Court involving the ownership and title to this automobile. It certainly is not in this litigation.

Mr. Arditto: This Cadillac is certainly in this litigation.

Mr. Haley: And it is now an attempt to bring it in a deposition with the case pending in the Federal Court between the corporation and your client. It is not material to the present situation.

Mr. Arditto: The record will show that the Cadillac automobile is in the jurisdiction of the Superior Court of the State of California.

Mr. Haley: You can argue that matter before the Federal Court, because I am not going to argue it here in the absence of a court hearing.

Mr. Arditto: I am going to argue it both before the Federal Court and before this Court.

Mr. Haley: You can't argue it here. It is at issue in the Federal Court."

That one of the issues involved in the said action in said Superior Court, which was commenced at least thirty-three days before the above entitled action was commenced is whether the Cadillac automobile, which is the subject matter of this action, is the separate property of Mrs. Shipp or the separate property of Mr. Shipp, or the community property of Mr. and Mrs. Shipp or the property of the above named plaintiff.

That at all times since the purchase of said Cadillac automobile in March 1947, up to and including the 14th day of April, 1948, the Cadillac automobile, which is the subject matter of this action, was in the possession and control of Elaine Shipp, one of the [23] defendants above named. That on April 8, 1948, Everett S. Shipp, who is the owner of at least 75% of the stock of the above named alleged corporation (also the director and the president and the general manager of said alleged corporation) did, as disclosed by the minutes of said alleged corporation of April 8, 1948, call the alleged directors of said alleged corporation to a special meeting for the purpose of starting the above entitled action; that all of said transactions occurred at the time that the restraining order of March 9, 1948, hereinbefore referred to, was in full force and effect.

That your affiant has information and believes and therefore alleges upon such information and belief that the commencement of the above entitled action was a subterfuge conceived of by Mr. Shipp as a means of circumventing the restraining order of said Orlando H. Rhodes and the jurisdiction of said Superior Court.

JAMES J. ARDITTO

Subscribed and sworn to before me this 24th day of May, 1948.

(Seal)

HELEN G. KAUFMAN

Notary Public in and for the County of Los Angeles,
State of California

My Commission Expires Sept. 2nd, 1951. [24]

“EXHIBIT A”

J. Edward Haley
453 South Spring Street
Los Angeles, California
Michigan 1997
Attorney for Plaintiff

In the Superior Court of the State of California, in
and for the County of Los Angeles.

Everett S. Shipp, Plaintiff vs. Elaine Shipp, Defendant.
No.

COMPLAINT FOR DIVORCE
(Extreme Cruelty)

Plaintiff complains of defendant and alleges:

I.

That at all times herein mentioned, plaintiff and defendant have been and are now husband and wife.

II.

That for more than one year last past, plaintiff has been and is now a bona fide resident of the County of Los Angeles, State of California.

III.

For statistical purposes required by Section 426a of the Code of Civil Procedure of the State of California, plaintiff alleges:

1. Plaintiff and defendant intermarried at Las Vegas, Nevada;
2. The date of marriage was on or about April 22, 1940; [25]
3. The date of separation was March 2, 1948;

4. The time that has elapsed from the date of marriage to the date of separation was seven years, ten months and eleven days;

5. That there have been no children born of said marriage.

IV.

That there is no community property belonging to the parties.

V.

Repeatedly and on many occasions during the marriage of the parties, and particularly during the past year, defendant has been guilty of extreme acts of mental cruelty. That each and all of said acts have caused plaintiff to suffer mental pain and suffering, all of which makes it impossible to continue the marriage relation.

VI.

At the present time the parties are residing at 641 Toyopa Drive, Pacific Palisades, California. That this is a home owned by Metropolitan Finance Corporation of California, and all of the furniture and furnishing are the separate property of plaintiff, except for a few personal effects which defendant has received as gifts from this plaintiff. That defendant owns a home of her own located at 1144 Kagawa Avenue, Pacific Palisades, California, which home is fully furnished and which would be adequate for the defendant to move to.

VII.

That by reason of the acts of defendant, plaintiff requests that an order be made by this court ordering the

defendant to move and vacate the home where the parties are now living.

VIII.

That by reason of the various physical threats which defendant has made toward plaintiff, defendant should be restrained and enjoined from interfering or in any manner in molesting [26] defendant or his property.

Wherefore, plaintiff prays:

(a) That he be granted an interlocutory decree of divorce, and that when one year has expired after the entry of said interlocutory decree of divorce a final judgment of divorce be entered;

(b) That he be granted an order by the court, in which said order defendant shall be required to move from the home now occupied by the parties, and that pending the final determination of this action that an order to show cause be issued, and upon hearing thereof that such order be made requiring the removal of said defendant from the home of the parties;

(c) That upon the termination of this action, defendant be restrained and enjoined from interfering with, or molesting plaintiff or from taking any of the personal property owned by this plaintiff;

(d) For such other and further relief as to the court seems just.

(Signed) J. EDWARD HALEY

Attorney for Plaintiff [27]

“EXHIBIT B”

Waters, Arditto and Waters
621 Roosevelt Bldg.
727 West 7th Street
Los Angeles 14, California
Attorneys for Defendant and Cross-Complainant

In the Superior Court of the State of California in and for the County of Los Angeles.

Everett S. Shipp, Plaintiff and Cross-Defendant, vs. Elaine Shipp, Defendant and Cross-Complainant. No. D 356,410.

ANSWER AND CROSS-COMPLAINT

Now Comes Defendant and answering the complaint on file herein, admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraphs I, II and II of the complaint.

II.

Denies the allegations contained in paragraphs IV of the complaint.

III.

Denies generally, specifically and positively each, all and every allegation, matter and thing contained in paragraph V of the complaint.

IV.

Denies generally, specifically and positively, each, all and every allegation, matter and thing contained in paragraph VI of the complaint, except that defendant admits that she is residing at 641 Toyopa Drive, Pacific Palisades, California. [28]

V.

Denies that she has committed, performed or engaged in any acts which would induce or justify the Court to order the defendant to move and vacate 641 Toyopa Drive as alleged in paragraph VII of the complaint.

VI.

Denies that she, a woman of ninety pounds, has made any physical or any other kind of threats toward defendant, a man of two hundred pounds, all as alleged in paragraph VIII of the complaint.

And for a Cross-Complaint for Separate Maintenance

Further answering plaintiff's complaint herein and by way of cross-complaint, defendant alleges as follows:

I.

That cross-complainant, Elaine Shipp, and cross-defendant, Everett S. Shipp, were married on or about April 22, 1940, in Las Vegas, Nevada.

II.

That on March 2, 1948, cross-defendant wilfully deserted cross-complainant, and now refuses to properly support said cross-complainant without any cause on the part of cross-complainant. That on March 2, 1948, the parties separated as man and wife.

III.

That cross-complainant is now and for a year past has been a resident of the County of Los Angeles, State of California.

IV.

That the following property was acquired after said parties had intermarried and said property was acquired with community funds and is community property;

- (1) All of the shares of stock in the following corporations:
 - (a) Metropolitan Finance Corporation,
 - (b) Metropolitan Finance Corporation of California
 - (c) Investors Realty Corporation, [29]
 - (d) Chesley Finance Corporation,
 - (e) Summit Realty Corporation,
 - (f) Summit Investors Corporation.
- (a) The following automobiles:
 - (a) 1947 Cadillac Sedan, 62,
 - (b) 1948 Dodge Sedan,
 - (c) 1948 Mercury,
 - (d) 1942 Oldsmobile Sedan,
 - (e) 1948 Dodge Truck.
- (3) Bank deposits in the following banks:
 - (a) California National Bank, Santa Monica,
 - (b) Citizens National Bank, Los Angeles;
 - (c) Security First National Bank, Los Angeles,
 - (d) Bank of America, Los Angeles.
- (4) Home and furnishings at 641 Toyopa Drive, Pacific Palisades, California.
- (5) A number of Insurance and Annuity Policies, the number of and cash surrender value of being unknown to cross-complainant.
- (6) Stocks, bonds and money in safe deposit boxes in the banks mentioned in sub-paragraph (1) of this paragraph.
- (7) Club memberships in the following clubs:
 - (a) Los Angeles Country Club,
 - (b) Los Angeles Athletic Club,
 - (c) Del Mar Country Club.

- (8) An amount of jewelry which is not known to cross-complainant.
- (9) About 400 houses already built or in the process of being completed.

V.

That since the marriage of said cross-complainant and cross-defendant, the said cross-defendant, in utter disregard of his marriage vows, duties and obligations to cross-complainant herein, has been guilty of extreme cruelty toward cross-complainant and has treated [30] cross-complainant in a cruel and inhuman manner and has wrongfully and, without cause, inflicted upon cross-complainant grievous mental and physical suffering as more particularly charged, alleges and set forth as follows:

(a) That on divers and many occasions, the cross-defendant has struck cross-complainant with his hands and thereby inflicted physical injury upon plaintiff herein;

(b) That in the presence of servants, the cross-defendant has on divers and many occasions struck the cross-complainant with his hands and thereby inflicted upon the cross-complainant great physical injury and thereby embarrassed and humiliated cross-complainant before said servants;

(c) That in the presence of mutual friends of the parties hereto and in the presence of servants, the cross-complainant has, without cause, on many and divers occasions, engaged in unwarranted and irritating repetitious arguments with cross-complainant while the latter was very seriously ill and the cross-defendant was under the influence of intoxicating liquors and thereby embarrassed and humiliated cross-complainant before said friends and servants;

(d) That cross-defendant, knowing that cross-complainant was seriously ill and had undergone three (3) major operations within the past year attempted to aggravate her illness and delay her recovery by saying, on divers and many occasions, the following:

(I) "You poor, miserable creature."

(II) "You have cancer and you cannot recover."

(III) "You haven't a chance to get well."

(IV) "If I had my way I would give you an overdose."

(V) "I cannot afford to pay all these medical bills."

(e) That cross-defendant on divers and many occasions drank to excess and upon becoming drunk would torment and irritate [31] cross-complainant, although he was well aware of her serious physical condition;

(f) That cross-defendant intentionally and continuously was slamming doors to upset cross-complainant and thus delay or prevent her recovery from said illness;

(g) That cross-defendant on divers and many occasions and while under the influence of intoxicating liquors would, in the presence of mutual friends and the servants, unnecessarily and without cause, complain of the cost of cross-complainant's medical bills and the cost of running the household, and thereby embarrassed and humiliated cross-complainant before said friends and servants.

(h) That cross-defendant has, on divers and many occasions, refused to take cross complainant on boat trips and other week-end trips he was planning to take and which he took.

VI.

That the above and foregoing acts of cruelty are only a few of the acts wilfully and wrongfully inflicted by

the cross-defendant upon cross-complainant and as a result therefrom cross-defendant has suffered great and grievous mental and physical cruelty, embarrassment and deep humiliation, and it has made the marital relation with cross-defendant no longer tolerable.

VII.

That said acts have been done without the connivance and collusion of this cross-complainant.

Wherefore, defendant and cross-complainant prays judgment of the above named court as follows:

(a) That plaintiff and cross-defendant take nothing by his action herein;

(b) That defendant and cross-complainant may live separate and apart from the *defendant*;

(c) That plaintiff and cross-defendant be ordered to pay to [32] defendant and cross-complainant a reasonable sum for her support and maintenance both during the pendency of this action and permanently thereafter;

(d) That plaintiff and cross-defendant be ordered to pay defendant's and cross-complainant's reasonable attorneys fees and court costs, including cost of determining community interest;

(e) That plaintiff and cross-defendant be enjoined and restrained from selling, transferring, hypothecating or in any manner encumbering or disposing of the property listed and referred to in paragraph IV of this cross-complaint;

(f) That plaintiff and cross-defendant be enjoined and restrained from molesting or interfering with the defendant and cross-complainant;

(g) That defendant and cross-complainant be given all the community property of the parties hereto;

(h) For such other and further relief as to this court may appear meet and proper in the premises.

WATERS, ARDITTO AND WATERS

By: (signed) JAMES J. ARDITTO

James J. Arditto

Attorneys for Defendant and Cross-Complainant [33]

“EXHIBIT C”

Waters, Arditto and Waters,
621 Roosevelt Building
Attorneys for Defendant

Address

Telephone: Madison 65133

In the Superior Court of the State of California in and for the County of Los Angeles.

Everett S. Shipp, Plaintiff, vs. Elaine Shipp, Defendant. No. D 356,410.

Order to Show Cause and Affidavit in re Attorney's Fees, Court Costs, Alimony Pendente Lite, Allowance for Support and/or Custody of Children and Restraining Order.

(Strike out inappropriate portions.)

To the above named Plaintiff, Everett Shipp:

(1) You are hereby ordered to appear before the above-entitled court in Department 8 thereof on the 17th day of March, 1948, at the hour of 1:45 P. M., then and there to show cause, if any you have, why:

(a) You should not be required to pay the adverse party above named reasonable sums for attorney's fees, court costs, and for the support and maintenance of said adverse party and the minor children during the pendency of this action.

(b) The custody of the minor children of the parties above-named should not, during the pendency of this action, be awarded as follows: none.

(c) Pending the trial of this action you should not be, and pending the hearing on this Order, you are enjoined and restrained from: opening and withdrawing any money, stock, bond or other thing of value from safety deposit boxes in your name or in which you have an interest through stock ownership, withdrawing any money deposited in the California Bank at 1401 3rd Street, Santa Monica, Citizens National Bank or any of its branches, Bank of America, or any of its branches, Security National Bank, or any of its branches in your name, the plaintiff's name or in the name of the Metropolitan Finance Corporation, Metropolitan Finance Corporation of California, Chesley Finance Corporation, Investor's Realty Corporation, Summit Realty Corporation or in which any of you or said corporation have an interest. Selling, hypothecating, transferring or conveying any personal or real property in which plaintiff or defendant has a community property interest regardless of the name in which such property may be held except in the usual course of business or for the necessities of life.

Molesting or interfering with the defendant and her use and occupancy of the home at 641 Toyopa Drive and her use of a 1947 Cadillac.

Points and Authorities must be placed on the back of this affidavit if a restraining order is sought.

(2) It appearing that the convenience of the court and the prompt and efficient disposition of the business thereof require the same, it is further ordered that you serve upon the adverse party and file with this court, at least two days prior to the date of hearing above specified, an affidavit in substantially the form of that hereunto attached, giving the information therein called for.

(3) This order shall be served by personally delivering a copy thereof attached to a copy of the affidavit upon which it is based, together with a copy of the Form denominated "Husband's Questionnaire," to the party af-

3

fectured at least ~~five~~ days prior to the date of hearing.

Dated March 9, 1948,

ORLANDO H. RHODES

Judge of the Superior Court

Affidavit on Reverse Side [34]

WIFE'S QUESTIONNAIRE

Attorneys representing the wife in Domestic Relations cases are requested to use this form in every such case involving attorney's fees, court costs, alimony pendente lite, a temporary restraining order, allowance for support and/or for custody of children; it will itself constitute the affidavit for, (or in opposition to) the order to show cause.

Affidavit for Order to Show Cause in re
attorneys fees, court costs, alimony Pendente Lite and
restraining order

State of California,
County of Los Angeles—ss.

Elaine Shipp, being first duly sworn, deposes and says:
That she is the Defendant in the above-entitled action

and that she has read the following questions and makes the following answers and statements of fact as material evidence in this case.

1. Date of Marriage: 4/22/40 of separation: 3/2/48
2. What is your age? 42 Husband's age? 55
- 3A. Have you any organic disease or major physical defect, and if so, what? Yes Serious intestinal disorder. Have had three major operations in past year.
- 3B. Has your husband any organic disease or major physical defect, and if so, what? Not known
- 4A. What are your necessary Monthly expenses?

Carrying charge	
Rent	100.00
Food	200.00
Clothes	300.00
Transportation	100.00
Doctor & Dentist	400.00
Laundry	50.00
Utilities	50.00
Insurance	100.00
Incidentals	300.00
Total	1500.00

- 4B. Your Husband's? not known
- 5A. What is the present net financial worth of yourself? \$500 and community property interest
- 5B. Of your husband? \$2,000,000.00 including community property
- 6A. What is your present total monthly income from all sources? none

- 6B. Of your husband? \$5000 per month at least (information and belief)
- 7A. What was the net income last year from all sources (specify sources)
of yourself none except community property income which defendant is ignorant of
- 7B. of your husband? *no* known
8. Have you ever been employed? No State the dates, occupations, and salaries received.....
9. Do you expect to work in the future? *no* At what occupation? illness prevents my working
Commencing when?.....
10. Have you personally arranged to pay your attorney's fees in this case? *no* how much, if anything, have you paid? *none* Court costs? *none*
11. State number, names and ages of minor children of yourself and husband: *none*
12. Custody of children at present is as follows: *none*
13. I request that an order be made fixing their custody as follows:.....
14. Where and with whom do you reside? 641 Toyopa Drive, Pacific Palisades
15. Where do you intend to house children and with whom? Describe accommodations:.....
..... [35]
16. Here state additional material facts, if any: (If Restraining Order is sought state here the facts you claim justify it, etc.) Plaintiff has threatened to:
(1) molest defendant
(2) Sell or otherwise convey property held in his name and the name of the corporations or

businesses listed in the Order herein. Withdraw bank deposits, etc.

- (3) Sell 1947 Cadillac the title to which is normally carried in the names of the Metropolitan Finance Corporation of California which is merely a dummy corporation (like the others) for Mr. Shipp who owns all the stock and/or interest therein.

17. Based upon the foregoing facts I declare that the following sums are reasonably necessary, are within the ability of my husband to pay, and that it will be fair and equitable to require him to pay them:

(1) For attorney's fees (pending trial) \$3,500.00

(2) For court costs (including cost of determining community interest) \$2,000.00

(3) For alimony pendente lite, per month \$1,500.00
Payable.....

(4) For medical bills \$ 400.00

18. I have answered each of the foregoing questions and given all the information called for as far as within my ability to do so and each answer and statement of fact is true to my own knowledge excepting only such as are stated to be upon information and belief and as to such latter I have stated the sources of my information and I verily believe the same to be true.

(signed) Elaine Shipp

Wife's Signature.

J. F. MORONEY, County Clerk.

By....., Deputy.

Subscribed and sworn to before me, this March 8,
1948.

Helen G. Kaufman
Notary Public, Los Angeles County, California.

FINANCIAL STATEMENTS

Statement of all community property, both real and personal, belonging to husband and wife:

Cash in possession of wife \$.....

Cash in possession of husband \$.....

No.	Description	Gross Value	Incumbrances	Gross Income	Fixed Charges	Net Income
....	Bank deposits	\$200,000	defendant	informed	and	believes
....	All of the stock or interest in 440 homes	1,000,000	"	"	"	"
....	Metropolitan Finance Corporation of California, a Delaware Corp.)				
....	Metropolitan Finance Corporation)				
....	Investors Realty Corporation)				
....	Summit Realty Corporation)				
....	Chesley Finance Corporation)				
....	Summit Investors Corporation)				
....	Five automobiles — Cadillac Dodge, Plymouth, Dodge Truck, Mercury	\$10,000				
			\$1,000,000	Defendant is		informed and believes

Statement of all separate property, both real and personal, owned by wife:

House 1144 Kagawa Avenue (mother has \$4500 interest in house)	1500	\$10,000	100 per mo.	none
--	------	----------	-------------------	------

Statement of all separate property, both real and personal owned by husband: not known [36]

“EXHIBIT D”

Waters, Arditto and Waters
621 Roosevelt Building
727 West 7th Street
Los Angeles, California
Attorneys for Defendant
Phone:—MA 6-5133

In the Superior Court of the State of California in and for the County of Los Angeles.

Everett S. Shipp, Plaintiff, vs. Elaine Shipp, Defendant. No. D 356410.

ORDER

The hearing on plaintiff's and cross-defendant's order to show cause dated March 5, 1948, and defendant's and cross-complainant's order to show cause dated March 9, 1948, supported by defendant's and cross-complainant's original affidavit of March 8, 1948, and her amended affidavit of April 10, 1948, came regularly on for hearing on the 16th day of April 1948, and was continued through the 19th day of April 1948 before Department 20 of the above entitled court and the court being fully advised in the premises and with stipulations of the above named parties before it, now makes the following order in the above entitled matter:—

(1) The plaintiff and cross-defendant (hereinafter called plaintiff) shall pay to the defendant and cross-complainant (hereinafter called the defendant) the sum of Four Hundred and Fifteen (\$415.00) Dollars on April 15, 1948, for *an* on account of defendant's living expenses. This sum shall be paid through defendant's attorneys. The sum of \$415.00 shall also be paid to [37] defendant,

through said attorneys, on the 15th day of each following month thereafter until time of trial.

(2) The plaintiff shall pay the sum of \$184.35 to the defendant on or before April 23, 1948. This sum shall be paid through defendant's attorneys and is to cover \$100.50 of bills already paid by defendant and to cover \$83.85 of bills which have been incurred by defendant but not paid as of the date of this order by defendant.

(3) The plaintiff shall, on or before April 23, 1948, pay directly to the following individuals the following sums for nursing services rendered to the defendant above named:—

(a) Mrs. Berg—\$431.00

(b) Miss Larkin—\$120.00

(4) The plaintiff shall, on or before April 23, 1948, pay to Mrs. Washington through said attorneys, the sum of \$62.50 for housemaid services rendered to the defendant above named between April 1, and April 15, 1948.

(5) The plaintiff above named shall pay, through Dr. John C. Sharpe of 120 South Laskey Drive, Beverly Hills, California, the reasonable value of all medical services heretofore or hereafter to be rendered to the defendant above named, provided said Dr. Sharpe believes said services to be or have been necessary.

The plaintiff shall also pay through said Dr. Sharpe all reasonable nursing bills presented to Dr. Sharpe by any nurses who may, on or after April 15, 1948, render nursing services to the defendant above named.

The plaintiff above named shall also pay through said Dr. Sharpe all reasonable bills, presented to said Dr. Sharpe for drugs, medicines, dressings, etc. by the defendant above named as long as it was reasonably necessary to incur said bills.

(6) The plaintiff above named shall, on or before May 1, 1948, pay to I. G. Magnin & Co. the sum of \$799.50 per their bill [38] rendered to the defendant above named and dated March 3, 1948.

(7) The plaintiff above named shall, on or before May 1, 1948, pay Barker Bros. about \$69.00 per bill heretofore rendered to Mrs. Shipp by said Barker Bros., such payment to be made by plaintiff only if said bill is unpaid as of May 1, 1948.

(8) The plaintiff above named shall, on or before May 17, 1948, pay directly to Waters, Arditto and Waters, attorneys for defendant above named, the sum of \$5000.00, on account, for legal services rendered to date and to be rendered to defendant above named; this allowance, on account, is made pending trial of this matter and the true value of said legal services (heretofore rendered or to be rendered in the future) shall be determined by the court at the time of trial of this action. Plaintiff herein is to be given credit for the \$1000 heretofore paid to said attorneys and thus need only make a net payment to said attorneys of \$4000.00 on or before May 17, 1948.

(9) The plaintiff above named shall pay to the notary taking the same, the cost of taking the deposition of the plaintiff or the defendant above named if the same or

either of them, are taken at the will of either of the above named parties.

(10) The plaintiff above named shall, on or before April 23, 1948, pay directly to Waters, Arditto and Waters, the attorneys for the defendant above named, the sum of \$410 as reimbursement of costs reasonably incurred by said attorneys in the amount of \$235 as of the date of this order and also in the amount of \$175.00 on account to cover costs reasonably expected to be incurred prior to the trial of the above entitled matter.

(11) The plaintiff above named shall on or before April 23, 1948, pay, on account, the sum of \$500 for auditing services rendered to the defendant above named by Lybrand, Ross & Montgomery, a firm of certified public accountants. This payment, on account shall be made through the defendant's attorneys hereinbefore mentioned. This payment [39] is merely made on account and the defendant above named must justify the same as being reasonable and also justify the necessity for such services and any similar services heretofore rendered or hereinafter to be rendered to said defendant.

(12) The plaintiff above named, shall pending trial of this matter or further order of this court, be restrained and enjoined from:—

- (a) Molesting defendant either directly or indirectly through other persons;
- (b) Knowingly being in defendant's presence;
- (c) Interfering, directly or through other persons, with defendant's use or possession of the 1947 Cadillac if defendant legally regains possession of the same.

- (d) Causing or permitting any stock, that has been or will be issued to plaintiff, by Metropolitan Finance Corporation of California, or Metropolitan Finance Corporation, or Chesley Finance Corporation or Investors Realty Corporation or Summit Realty Corporation to be transferred or conveyed to another person, corporation or other type of business entity;
- (e) Causing or permitting plaintiff's evidence of ownership in the corporations mentioned in (d) *supra*, to be changed on the books of said corporation;
- (f) Transferring, assigning, selling, disposing, conveying, or encumbering any real or personal property of the parties above-named or either of them, whether such property is the community property of said parties or the separate property of either of said parties, except that plaintiff may make such transfers, etc. as may be reasonably necessary in order to:— [40]

- (1) Comply with this order;
- (2) To pay his current living expenses;
- (3) To pay a reasonable fee to his attorney, J. Edward Haley, for Mr. Haley's services in the above entitled matter.

(13) The defendant is to remain in possession of the home used by the parties hereto which is located at 641 Toyopa Drive, Pacific Palisades, California, for her use as a home free from molestation by the plaintiff or by others under his control; however, the plaintiff shall retain exclusive possession of his bedroom in said home for storage purposes only, and may place a lock on the door of said bedroom if he so desires.

(14) The plaintiff above named in using the bedroom of said home for storage purposes shall abide by the following:—

- (a) His use for such purposes shall be only such as shall be reasonably necessary.
- (b) His visits shall be as infrequent as is possible.
- (c) Before each visit to said bedroom for said purposes he must notify defendant's attorneys of his proposed visit.
- (d) Such visits must be made at reasonable hours.

(15) The hearing on the above entitled matters shall hereby be continued until 9:00 o'clock A. M. on May 10, 1948, before Department 20 of the above entitled court for the following purposes.

- (a) To determine what further amounts shall be allowed to the defendant above named, pending trial, for auditing services heretofore rendered or hereafter to be rendered to defendant.
- (b) To determine what further amounts shall be allowed to the defendant above named, pending trial, for services heretofore rendered or hereinafter to be rendered to [41] defendant by an investigator or investigators.
- (c) To determine the extent to which this order has been complied with as of this date.
- (d) To make such other and further order as to the Court may seem proper.

Dated: May 14th, 1948.

(Signed) JOSEPH W. VICKERS

Judge of the Superior Court [42]

vs. Ellsworth W

E. S

Metropolit
Cor
of Con
Preferred

Owned by	
Metropolitan Finance Corporation of California	—
Chesley Finance Corporation	6,262.3 25%
Metropolitan Finance Corporation	(12,058.3 (48%
Investors Realty Corp.	—
Summit Realty Corporation	—
E. S. Shipp	4,042.53
Elaine Shipp	—
Dave X. Marks	142 .56%
Robert L. Shipp	47
Others	2,458.86 10%
Total	25,0

3]

[Affidavit of Service b

[Endorsed]: Filed Ma
Clerk. [44]

(14) The plaintiff above named in using the bedroom of said home for storage purposes shall abide by the following:—

- (a) His use for such purposes shall be only such as shall be reasonably necessary.
- (b) His visits shall be as infrequent as is possible.
- (c) Before each visit to said bedroom for said purposes he must notify defendant's attorneys of his proposed visit.
- (d) Such visits must be made at reasonable hours.

(15) The hearing on the above entitled matters shall hereby be continued until 9:00 o'clock A. M. on May 10, 1948, before Department 20 of the above entitled court for the following purposes.

- (a) To determine what further amounts shall be allowed to the defendant above named, pending trial, for auditing services heretofore rendered or hereafter to be rendered to defendant.
- (b) To determine what further amounts shall be allowed to the defendant above named, pending trial, for services heretofore rendered or hereinafter to be rendered to [41] defendant by an investigator or investigators.
- (c) To determine the extent to which this order has been complied with as of this date.
- (d) To make such other and further order as to the Court may seem proper.

Dated: May 14th, 1948.

(Signed) JOSEPH W. VICKERS

Judge of the Superior Court [42]

"EXHIBIT E"

E. S. SHIPP CORPORATE INTERESTS
STOCK OWNERSHIP

As at December 31, 1947

Owned by	Metropolitan Finance Corporation of California		Chesley Finance Corporation		Metropolitan Finance Corporation	Investors Realty Corporation,	Summit Realty Corporation
	Preferred	Common	Preferred	Common	Common	Common	Common
Metropolitan Finance Corporation of California	—	—	—	—	—	—	—
Chesley Finance Corporation	6,262.3 25%	—	—	—	2,250 9%	—	—
Metropolitan Finance Corporation	(12,058.3 (48%	500 100%	—	—	—	—	—
Investors Realty Corp.	—	—	—	—	—	—	—
Summit Realty Corporation	—	—	—	—	—	—	—
E. S. Shipp	4,042.531	—	11,967 96%	12,074½ 96.60%	18,124 75%	2,500 100%	2,500 100%
Elaine Shipp	—	—	—	100 .80%	—	—	—
Dave X. Marks	142 .56%	—	—	—	245 1%	—	—
Robert L. Shipp	47	—	—	—	1	—	—
Others	2,458.869 10%	—	533 4%	325½ 2.60%	3,663 15%	—	—
Total	25,011	500	12,500	12,500	24,283	2,500	2,500

[43]

[Affidavit of Service by Mail.]

[Endorsed]: Filed May 25, 1948. Edmund L. Smith,
Clerk. [44]

[Title of District Court and Cause]

STATEMENT OF REASONS AND OPPOSITION
OF DEFENDANTS' MOTION TO REMAND
CAUSE TO SUPERIOR COURT IN AND FOR
THE COUNTY OF LOS ANGELES, STATE OF
CALIFORNIA, OR TO DISMISS ACTION AND
POINTS AND AUTHORITIES

To the Defendants Ellsworth Wood and Elaine Shipp and
to Messrs. Waters, Arditto and Waters and James J.
Arditto, Esq., Their Counsel:

The plaintiff received a Notice of Motion to Remand
or Dismiss the action, together with Points and Authori-
ties, on May 21, 1948. On May 25, 1948, the plaintiff
received the Affidavit of James J. Arditto in support of
Motion to Dismiss or Remand, together with exhibits.

The plaintiff above named opposes the defendants' Mo-
tion to Remand or Dismiss action, and makes the follow-
ing statements of its reasons and opposition thereto, as
provided in Rule 3(d) of the Local Rules of the District
Court:

I.

That the action pending in the Superior Court of the
State [45] of California, in and for the County of Los
Angeles, No. D356410, is between Everett S. Shipp, as
plaintiff, and Elaine Shipp, as defendant. These are the
only parties to this cause of action, as more fully appears
by referring to Exhibit "A" attached to the Affidavit of
James J. Arditto.

The action pending in this court is between a corporation, to wit, The Metropolitan Finance Corporation of California, as plaintiff, and Ellsworth Wood and Elaine Shipp, as defendants. It, therefore, appears that the plaintiff in this cause and the defendant Ellsworth Wood are not parties to the action pending in the State court.

The plaintiff in this cause claims the ownership, possession and title to the Cadillac automobile. The defendant, Ellsworth Wood, alleges in his Answer that since April 4, 1948, he has been the owner of said automobile, and that he is now entitled to the possession thereof. The defendant, Elaine Shipp, alleges that she has been the owner of the said automobile since March 1947 and is now entitled to the possession thereof.

II.

That the Motion of the defendants alleges, on page 2 thereof, beginning at line 1, that on March 9, 1948, Honorable Orlando H. Rhodes, Judge of said Superior Court, issued an order restraining Everett Shipp from interfering with Elaine Shipp's use of the said Cadillac automobile. That on page 2 of the Affidavit of James J. Arditto, at line 5, a similar statement is made, and reference is made to Exhibit "C", but the defendants have failed to attach a copy of said Exhibit "C". That said order is directed against Everett Shipp, who is not a party to this action, and that said order was not directed against the plaintiff in this action, to wit, The Metropolitan Finance Corporation of California, nor could the same have been so directed for the reason that the plain-

tiff in this action was not a party and is not now a party to the action pending in said State court. [46]

III.

That there are no allegations in the Answer of either of the defendants supporting the statement that Everett S. Shipp owns at least seventy-six per cent (76%) of the stock of the plaintiff. That in this connection the fact is that the plaintiff corporation was organized at or about July 7, 1923, in Wilmington, Delaware, and that the said Everett S. Shipp was one of the organizers of said corporation. That as will appear from Exhibit "A", attached to the Affidavit of James J. Arditto, the said Everett S. Shipp and the defendant Elaine Shipp were married on April 22, 1940. That the plaintiff corporation has fifty-one (51) stockholders, with total outstanding shares of twenty-five thousand and eleven (25,011), and that out of said entire outstanding stock the said Everett S. Shipp owns four thousand forty-two and one-half (4,042½) shares.

IV.

That there has been submitted to counsel for the defendants, in accordance with the pretrial hearing, among other things, the following documents which are attached hereto and made a part hereof:

Exhibit A Purchase contract for said automobile.

Exhibit B Check of Metropolitan Finance Corporation for \$100.00.

Exhibit C Receipt from Don Lee showing payment of \$3,033.09.

Exhibit D Check of Metropolitan Finance Corporation payable to Don Lee, for \$3,033.09.

Exhibit E Copy of Certificate of Ownership issued by the Motor Vehicle Department.

That it would appear from the foregoing that the automobile in dispute in this action was originally purchased by the plaintiff corporation and the purchase contract made in the name of the plaintiff corporation with a deposit of \$100.00; that the check for the deposit was issued by the plaintiff corporation; that the final payment at [47] the time of delivery of the automobile was made by the plaintiff corporation; that the title was registered in the name of the plaintiff corporation, and that the defendants do not allege or claim the plaintiff corporation has ever sold or transferred said automobile to them. That the plaintiff corporation is not a party in the State action, and that court is not empowered to determine the rights of the plaintiff corporation, and that the plaintiff corporation has never at any time been under any order of the State court nor has the State court acquired jurisdiction over it.

Dated: June 1, 1948.

Respectfully submitted,

HENRY SCHAEFER, JR.

RAYMOND V. HAUN

WILLIAM GAMBLE

DEXTER D. JONES

By Henry Schaefer, Jr. [48]

“EXHIBIT A”

NEW CAR PURCHASE CONTRACT

Los Angeles, Calif., Nov. 17, 1945

(1) The undersigned, hereinafter known as the Purchaser, hereby agrees to purchase from Don Lee, Inc., a California Corporation, of L. A., Calif., hereinafter known as the Seller; One New Cadillac Automobile Series No. 62 body style Sedan with standard equipment except as otherwise specified herein, to be delivered on or about.....19....., or prior thereto at the option of the Seller, at City of L. A., State of Calif.; and subject to the terms hereof agrees to pay therefor the California list price of Price in effect at time of delivery Dollars, (\$.....), plus California State sales tax, of which sum One hundred Dollars (\$100.00) is herewith paid on account of said purchase price, the balance to be paid upon the delivery of the automobile, unless otherwise provided herein. The sales price of said automobile shall be the prevailing California list price of car, extra equipment and accessories, at date of delivery plus California State sales tax, computed as indicated in schedule hereinbelow. Price of accessories and extra equipment shall be deemed to be price listed in schedule below plus California State sales tax, as indicated in said schedule. Delivery is to be accepted promptly by the Purchaser after notification that the said automobile is ready for delivery. The title to the said automobile shall remain in the Seller, until the purchase price is paid in full.

(2) It is understood and agreed that this automobile is to be secured by the Seller from the manufacturer and delivery by Seller is subject to delivery by manufacturer to Seller. The price stated herein is based on the present

list price of said manufacturer, and in case said manufacturer raises his price prior to delivery of this automobile then the Seller may raise the price herein stated accordingly.

(3) This acceptance is subject to the proviso that if any tax or other charge is imposed by the Federal, State, County or Municipal Government upon the manufacturer or this company, or upon the automobile delivered, the amount of such tax shall be added to the price of the automobile and paid by the purchaser hereunder.

(4) The Purchaser understands and agrees that this automobile is warranted by the manufacturer and not by the Seller and only in accordance with the printed warranty of the manufacturer on the back hereof.

(5) The Purchaser agrees that the automobile hereby purchased is for the use of the Purchaser, and that he is not acting as agent for any other person, and does not intend to transfer such automobile to any other party, and agrees that this contract is not assignable by said Purchaser without written consent of Seller.

(6) In the event that the model or series of automobile ordered is discontinued or mechanical or body specifications changed, Purchaser will accept another automobile made by the same manufacturer, the price of which reasonably approximates the contract price of the automobile ordered. Purchaser will receive credit for or pay the differential.

(7) No delay in delivery shall affect this contract unless it exceeds twelve (12) months from date of this contract, in which event either party may cancel this order and Seller will refund any cash deposit subject to the provisions of paragraph 8.

(8) If Seller takes used car as part of purchase price, Purchaser will execute bill of sale conveying title to Seller, or its nominee, upon delivery thereof to Seller. If car purchased hereunder is not delivered for any reason and regardless of fault, Seller may, at its option, in addition to any other remedies, (1) return used car to Purchaser after Purchaser pays all charges for repairs, storage, equipment, taxes, pay-off or other outlay or charge, or (2) Seller may pay Purchaser amount of agreed credit less (a) thirty-five percent (35%) of gross amount, (b) disbursements by Seller for pay-off, or (3) if used car has been sold by Seller, it may pay Purchaser amount received from sale less (a) thirty-five percent (35%) of gross amount received, (b) any sums expended in repairs or equipment, (c) disbursements by Seller for pay-off. Both parties agree that the thirty-five percent (35%) deductions above mentioned are based on handling cost and the fact that trade-in allowances are usually higher than cash sales price of used cars.

(9) Credit on used car trade-in, if any, shall not be effective until actual physical possession of used car (as same is defined in bill of sale covering said car), together with California certificates of ownership and registration properly endorsed by registered and legal owners are delivered to Seller. Subject to provisions of paragraph 8 hereof, this order shall be fulfilled whether or not trade-in is actually effected.

(10) There Are No Understandings, Agreements, Representations or Warranties, Expressed or Implied, Not Specified Herein Respecting This Contract or the Goods Hereby Purchased, and Buyer Expressly Acknowledges and Agrees That He Knows That No Salesman or Agent of the Seller, Other Than the Manager or Sales Manager

of the Seller Has Any Right or Authority to Bind the Seller in Any Respect Whatsoever, and Buyer Does Hereby Acknowledge That He Has No Claim Against Seller by Virture of Any Acts, Conduct, Omissions or Statements Made by Any Salesman or Agent of Seller Prior to the Execution of This Contract.

(11) This Order is Not Binding Upon the Seller Until Accepted in Writing, Signed by Manager or Sales Manager.

Note: Do not fill in prices on future orders if delivery is to occur beyond series current at date of order.

Cash List Price of		Detail of Down Payment and Terms	
Standard Equipped car	\$	Cash with order	\$100.00
State Sales Tax on Car		Cash on delivery	
Extra Equipment and		Trade \$..... Less Pay-off \$	
Accessories		Balance to be paid on Time	
Hyd. Metal		Contract	
Radio		Total \$	
Heater		Time payments on	finance plan
Total			
State Sales Tax, Extra		Plus financing charges	
Equipment and Accessories		Terms approved	Office Manager
Total Sales Price		Motor No.	Del'd. Charge No.
Fees: Registration \$		(Housing Construction)	
License: \$3.00		[Stamped]: Order subject to present and future governmental regulations.	
Total Payable \$		Approved Amount—Trade	
Name	Address	\$	
License Metropolitan Finance Corporation			
Remarks No trade.			
Salesman H. O. Wise			
Accepted for Don Lee Inc.			
the Seller			
By Gatty Jones			
		Purchaser's Signature	
		Metropolitan Finance Corporation	
		Address	
		By E. S. Shipp	
		4283 Crenshaw	
		Office Cards	Factory Card Mailed

☐ New Order. ☐ Resale Order.

“EXHIBIT B”

54th and 4th Avenue Office

2600 West 54th Street

California Bank

No. 31545

Commercial - Savings

16-150

Los Angeles, Calif.

METROPOLITAN FINANCE CORPORATION
OF CALIFORNIA

4283 Crenshaw Boulevard

Los Angeles, Calif., November 17, 1945 \$100.00

Pay One Hundred and no/100

to the

Order

of

┌

┐

Don Lee, Inc.

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METROPOLITAN FINANCE CORPORATION
OF CALIFORNIA

By E. S. Shipp

[Stamped]: 162 31

[Stamped on Back of Check]:

28 Pay to the Order of 28 Security-First National
Bank of Los Angeles Don Lee Don Lee, Inc.

28 Seventh & Witmer Br. 28 16-263 Nov 19
1945 Pay to the Order of Any Bank or Banker or
Through Los Angeles Clearing House All Prior Endorse-
ments Guaranteed Security-First National Bank 16-3
of Los Angeles 16-3

[Perforated]: Paid 11.19.45 [50]

“EXHIBIT C”

[Crest]

DON LEE

Incorporated

7th and Bixel Streets

Phone: TRinity 8411

Los Angeles 14, Calif., March 10, 1947

To Metropolitan Finance Corp. of California
4283 Crenshaw
Los Angeles, California

Net Cash CC-C5216 Your Order No.

1947 Cadillac, Series 61, 5P Sedan, Motor No.

5420612	\$3008.26
---------	-----------

City Tax	14.84
----------	-------

State Tax	74.18
-----------	-------

Lic. Fees	35.81
-----------	-------

\$3133.09

Less Previous Cash Deposit	100.00
----------------------------	--------

\$3033.09

Cash on Delivery

Job No. 6109

Body No. 399

Color No. 10, Trim 34

Key Nos. 8502, 8654

Sales Price of Materials Is Indicated Price Plus
California State Sales Tax

[Stamped]: Entered Mar 1947 Paid Don Lee, Inc.
Mar 10 1947 Los Angeles By B. Nevarez

[Written]: 253 Charge to ✓ CR Acct Rec
100.00 ✓ [51]

“EXHIBIT D”

33 - Leimert Park Branch - 16-308

Citizens National Bank

No. 1374

Trust & Savings
of Los Angeles
3423 West 43rd Place
Los Angeles, California

METROPOLITAN FINANCE CORPORATION
OF CALIFORNIA
4283 Crenshaw Blvd.

Los Angeles 43, Calif., March 8, 1947 \$3,033.09

Pay
to the
Order

of

┌

Don Lee Inc.

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METROPOLITAN FINANCE CORPORATION
OF CALIFORNIA

By E. S. Shipp.

[Endorsements on back of check]:

28 Pay to the Order of 28 Security-First National
Bank of Los Angeles Don Lee Don Lee, Inc.

28 Seventh & Witmer Branch 28 16-263 Mar 11
1947 Pay to the Order of Any Bank or Banker or
Through Los Angeles Clearing House All Prior Endorse-
ments Guaranteed Security-First National Bank 16-3
of Los Angeles 16-3

[Perforated]: Paid 3.10.47 [52]

"EXHIBIT E"

1947

AUTOMOBILE

CALIFORNIA

CERTIFICATE OF

OWNERSHIP

Residence, County of

Code

Name Metropolitan Finance Corp of Calif

Address 4283 Crenshaw

Code

Los Angeles Calif

19-LA

Registered Owner

Registration No. 8S2223

Engine No. 5420612

Make & Cyls. Cad 8

Body Type 5P Sed

Date First Sold 3-10-47

Year 1947

Date Issued 3-27-47NC AE-47

Model

Serial No. Same

Vehicle

Model 61

Previously

Regis.

License

Registered in

Fee \$3.00

Fee \$32.81

D350

ko

Legal Owner or Lien Holder

of Record with Dept.

Division Use Only

yes

42.00

L A

[53]

MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO MOTION TO REMAND
OR TO DISMISS

I.

In order for the Federal Court to dismiss an action because of a prior suit pending in the State Court, it must appear that the action in the State Court is between the same parties as the action brought in the Federal Court.

Boston Acme Mines Corporation vs. Salina Canyon Co., 3 Fed. (2nd) 729, 734.

II.

It must further appear that it is necessary for the Court in a determination of the cause to have in its possession or control the property which is the subject of the suit. In *Pennsylvania General Casualty Co. vs. Pennsylvania*, it is indicated that unless it is necessary for the Court to actually exercise jurisdiction over the property, such as in a receivership proceeding, that the general rule would be followed that both Courts would retain jurisdiction until judgment is obtained in one Court which may then be set up as *res judicata* in the other.

III.

The plaintiff corporation must be regarded as a separate entity and not a party to the State Court action until facts of unity of interest sufficient to permit disregarding the corporate entity are approved and until such is affirmatively shown, the corporation is a separate and distinct entity from any of its stockholders.

Relley vs. Campbell, 134 Cal. 175

Fletcher Cyclopedia Corporations, Vol. 1, Section 41, page 142.

IV.

Concentration of stockholders and ownership and control are not alone sufficient to permit disregarding the corporate entity. [54]

Welfare Investment Co. vs. Stowell, 6 Cal. App. 2d, 444. [55]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jun. 1, 1948. Edmund L. Smith, Clerk. [56]

[Title of District Court and Cause]

COUNTER AFFIDAVIT OF HENRY SCHAEFER,
JR. IN OPPOSITION OF MOTION TO DIS-
MISS OR REMAND

State of California,
County of Los Angeles—ss.

Henry Schaefer; Jr., being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff in the above entitled matter. That the Affidavit of James J. Arditto in Support of the Motion to Dismiss or Remand was received by affiant on May 25, 1948.

That with respect to the divorce action pending in the Superior Court between Everett S. Shipp and Elaine Shipp, one of the defendants herein, this affiant alleges that he is not, nor is any member of his firm, representing the said Everett S. Shipp in said divorce action, but as will appear from Exhibit "A" attached to the Affidavit of James J. Arditto, said Everett S. Shipp is represented by J. Edward Haley. [57]

That so far as this affiant knows, there is no litigation pending in the Superior Court of Los Angeles County, or any other court in any other place, between the plaintiff in this action, The Metropolitan Finance Corporation of California, and the defendant, Elaine Shipp, and that there is no action therefore to which this cause could be remanded. That this cause was originally filed in the above entitled court because of the diversity of citizenship of the plaintiff and the defendants, and the amount involved is over Three Thousand Dollars (\$3,000.00), and that this cause of action was not removed to this court from the State court.

That the defendant, Elaine Shipp, has filed her Answer in the above entitled matter and merely alleges that Everett S. Shipp owns at least eighty-five per cent (85%) of the stock of the plaintiff corporation, but makes no further allegations which are sufficient to pierce the corporation veil. That the affiant requested the Secretary of the plaintiff corporation to prepare a list of stockholders and the number of outstanding shares of each stockholder and the total number of shares outstanding. That from said list as prepared by said Secretary, it would appear there are twenty-five thousand and eleven (25,011) shares of the capital stock of the plaintiff outstanding, which are owned by fifty-one (51) different stockholders; that from said list it appears that said Everett S. Shipp is the owner of four thousand forty-two and 531/1000 (4,042.531) shares, and that the other fifty (50) stockholders own the remaining number of shares.

That so far as this affiant can ascertain, the plaintiff in this action has never been enjoined or restrained in its use or possession of the said Cadillac automobile which is the subject of this litigation.

That it will appear from the examination of the Answers filed herein of the defendants Elaine Shipp and Ellsworth Wood, that each of said defendants claims to be the owner of said Cadillac auto- [58] mobile, and each is entitled to the immediate possession thereof. That the defendant, Ellsworth Wood, is not a party to the action in the State court, and that the claims of the plaintiff and the defendants in this action can only be adjudicated in this court which has acquired jurisdiction over all of the parties and over the automobile, which is the subject of litigation by reason of the seizure of the same by the United States Marshal under claim and delivery. That

the defendants did not exercise their right to have re-delivery of said automobile by posting a bond within the time prescribed by law.

That the said Everett S. Shipp, so far as this affiant can ascertain, never has had title to said automobile and the same could not be the subject of property between he and the defendant Elaine Shipp either as community property or her separate property. It will appear from plaintiff's reasons for opposition that the plaintiff entered into an agreement to purchase on November 17, 1945, with Don Lee, Inc., Cadillac distributor; that this plaintiff paid its corporate check on November 17, 1945, to said Don Lee, Inc., for One Hundred Dollars (\$100.00); that on March 8, 1947, this plaintiff paid to Don Lee, Inc. Three Thousand Thirty-Three and 09/100 Dollars (\$3,033.09) by issuing its corporate check, and that on March 10, 1947, this plaintiff received a receipt for said \$3,033.09. That it will also appear from the opposition that the registration of said automobile was at the time of purchase registered in the name of the plaintiff, and this affiant alleges the same has remained in the plaintiff's name and now is in the plaintiff's name, and the plaintiff has not transferred the automobile to any person.

HENRY SCHAEFER, JR.

Subscribed and sworn to before me this 1st day of June, 1948.

(Seal)

DEXTER D. JONES

Notary Public in and for the County of Los Angeles,
State of California [59]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jun. 1, 1948. Edmund L. Smith,
Clerk. [60]

[Title of District Court and Cause]

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF
DEFENDANTS' MOTION TO REMAND OR TO
DISMISS THE ABOVE ENTITLED ACTION

State of California

County of Los Angeles—ss.

James J. Arditto, being first duly sworn on oath, deposes and says:

That he is a member of the law firm of Waters, Arditto and Waters; that he is one of the attorneys for the defendants above named and that the following is within his own personal knowledge:

That on June 4, 1948, Elaine Shipp, one of the defendants above named and the defendant and cross-complainant in the action pending in the Superior Court in and for the County of Los Angeles, State of California and referred to in the original affidavit of the undersigned filed herein, did, through and by [61] stipulation with Mr. Shipp (through his attorney) execute and file an amended answer and an amended cross-complaint in said Superior Court proceeding; that a copy of said amended answer and amended cross-complaint are attached hereto as Exhibits A and B respectively. That Paragraphs II and III of the affirmative amended answer and Paragraphs V and VI of the amended cross-complaint place in issue, beyond all per adventure of doubt, the alleged non existence of a separate entity on the part of the plaintiff in the above entitled action.

That Paragraph 7 of the Amended Cross-Complaint and Paragraph 7 of the Affirmative Amended Answer clearly allege the facts which, if proved will require a decree, by

said Superior Court, quieting title in the 1947 Cadillac in the defendant herein and therein Elaine Shipp.

That as disclosed by the pleadings on file herein Ellsworth Wood has a major remainder interest in the Cadillac in question after Elaine Shipp's life interest expires.

That as disclosed by Exhibit E, attached to the undersigned's original affidavit filed herein, Mr. Shipp owns about 81% of the stock of the above named plaintiff by virtue of the following:

(1) He owns 16% or 4,042.531 shares directly.

(2) He owns 96.6% of the 25% owned by Chesley Finance Corporation because he is the owner of 96.6% of said Chesley's shares. This gives him a 24.15% additional interest in the plaintiff above named.

(3) Mr. Shipp owns another 40.2% of the outstanding shares of stock in plaintiff above named by virtue of the following:

Metropolitan Finance Corporation owns 48% of the stock of the plaintiff above named; Mr. Shipp owns 75% of the stock of Metropolitan Finance Corporation directly and owns 8.7% of Metropolitan Finance Corporation by virtue of the fact that he owns 96.6% of [62] the stock of Chesley Finance Corporation, which in turn owns 9% of the stock in Metropolitan Finance Corporation; thus Mr. Shipp owns 83.7% of the stock of Metropolitan Finance Corporation which in turn owns 48% of the stock of plaintiff above named, and thus, Mr. Shipp owns 83.7% of 48% or 40.2% of the stock of the plaintiff above named by virtue of his stock holdings in Metropolitan Finance Corporation and Chesley Finance Corporation.

That by virtue of his direct and indirect stock holdings in plaintiff above named, plaintiff is the owner of the following shares of stock in the plaintiff above named:

4,042.531—directly;

6,037.06 —because of his 96.6% interest in Chesley Finance Corporation;

10,054.42 —because of his stock interest in Metropolitan Finance Corporation and Chesley Finance Corporation.

20,134.011 Total

In other words Mr. Shipp owns 20,134.011 shares of stock in the plaintiff above named which has issued and outstanding a total of 25,011 shares of stock.

That J. Edward Haley has been the attorney for the plaintiff above named for the past sixteen years; that the undersigned is informed and believes and therefore alleges upon such information and belief that the law firm representing the plaintiff in this action has never prior to the bringing of this action represented the plaintiff above named.

That the Superior Court herein before referred to acquired jurisdiction of the subject matter of this action thirty-three (33) days before the commencement of this action by virtue of the cross-complaint filed in said Superior Court by Mrs. Shipp and by virtue of the Honorable Orlando H. Rhodes' injunction and restraining [63] order of March 9, 1948, which is attached to the undersigned's original affidavit herein and marked Exhibit C thereto. That ever since March 9, 1948, the subject mat-

ter of this action has been in the legal custody of said Superior Court.

JAMES J. ARDITTO

Subscribed and sworn to before me this 5th day of June, 1948.

(Seal)

HELEN G. KAUFMAN

Notary Public in and for the County of Los Angeles,
State of California

My Commission Expires Sept. 2nd, 1951 [64]

“EXHIBIT A”

Waters, Arditto and Waters

621 Roosevelt Building

727 West 7th Street

Los Angeles 14, California

MADison 6-5133

Attorneys for Defendant and Cross-Complainant

In the Superior Court of the State of California in and for the County of Los Angeles

Everett S. Shipp, Plaintiff and Cross-Defendant, vs.
Elaine Shipp, Defendant and Cross-Complainant. No.
D 356410

AMENDED CROSS-COMPLAINT

Now comes Defendant and Cross-Complainant by stipulation of the above named parties through their attorneys, and for a cross-complaint against the above named plaintiff and cross-defendant admits, denies and alleges as follows, to-wit:

I.

That cross-complainant, Elaine Shipp and cross-defendant, Everett S. Shipp, were married on or about April 11, 1940, in Las Vegas, Nevada.

II.

That on March 2, 1948, cross-defendant wilfully deserted cross-complainant, and now refused to properly support said cross-complainant without any cause on the part of cross-complainant. That on March 2, 1948, the parties separated as man and wife.

III.

That cross-complainant is now and for a year past has been a resident of the County of Los Angeles, State of California. [65]

IV.

That the following property was acquired after said parties had intermarried and said property was acquired with community funds and is community property:

(1) All the shares of stock in the following alleged corporations:

- (a) Investors Realty Corporation;
- (b) Summit Realty Corporation.

(2) The following shares of stock of the alleged corporations:

- (a) 2500 shares in Metropolitan Finance Corporation of California;
- (b) 1500 shares in Metropolitan Finance Corporation;
- (c) 1500 shares in Chesley Finance Corporation.

(3) The following automobiles:

- (a) Dodge Sedan;
- (b) Mercury Coupe;
- (c) Oldsmobile Sedan;
- (d) Dodge truck.

(4) Bank deposits in the following banks:

- (a) California National Bank, Santa Monica;
- (b) Citizens National Trust & Savings Bank of Los Angeles;
- (c) Security First National Bank of Los Angeles;
- (d) Bank of America National Trust and Savings Association.

(5) Home of the parties hereto at 641 Toyopa Drive, Pacific Palisades, California.

(6) Furniture and furnishings in the home of the parties hereto at said 641 Toyopa Drive, Pacific Palisades, California, except the following which is defendant's and cross-complainant's separate property: [66]

- (a) Oriental rug in living room.
- (b) Bedroom set in her bedroom.
- (c) Coo-coo clock in entrance of home.
- (d) Chinese rose colored rug in dining room.
- (e) Sheffield Tea and Coffee Service in dining room.
- (f) Various sterling silver pieces.

(7) Insurance and annuity policies.

(8) Stocks, bonds and money.

(9) Jewelry, except the jewelry which has been given to defendant and cross-complainant as her own separate property.

(10) A note secured by Deed of Trust on the home and lot situated at 176 South Fuller Street, Los Angeles, California.

(11) Club membership in the following clubs:

- (a) Los Angeles Athletic Club.
- (b) Los Angeles Country Club.
- (c) Del Mar Country Club.

V.

That in addition to the community property listed in Paragraph IV of this amended cross-complaint, defendant and cross-complainant has been informed and believes and upon such information and belief alleges that the community property in an amount of One Hundred Thousand (\$100,000.00) Dollars was accumulated during the marriage of the parties hereto under the following circumstances:

The plaintiff and cross-defendant, during the marriage of the parties hereto had complete control and management of the following alleged corporations and owned and owns the following amount of stock in said alleged corporations and held and holds the following positions in said alleged corporations: [67]

<u>Corporation</u>	<u>Stock Owned</u>	<u>Position Held</u>
Metropolitan Finance Corporation	85%	President and General Manager, and Director
Metropolitan Finance Corporation of California	85%	"
Investors Realty Corporation	100%	"
Chesley Finance Corporation	96%	"
Summit Realty Corporation	100%	"

That during the eight (8) years immediately preceding the marriage of the parties hereto the plaintiff and cross-defendant received a total salary of Forty-Six Thousand, Five Hundred (\$46,500) Dollars from Metropolitan Finance Corporation; that during the approximate eight (8) years of the marriage of the parties hereto, he has re-

ceived from said alleged corporation a salary of Nine (\$9.00) Dollars.

That prior to the marriage of the parties hereto plaintiff and cross-defendant also received an annual salary of Nine Thousand (\$9000) Dollars a year from Chesley Finance Corporation; that since 1942 he had been receiving an annual salary of Forty-two Hundred (\$4200.00) Dollars.

That for the eight (8) years, immediately preceding the marriage of the parties hereto, plaintiff and cross-defendant received about Eighty Thousand (\$80,000) Dollars as salary from the Metropolitan Finance Corporation of California; that during the eight (8) years the parties hereto have been married plaintiff and cross-defendant has received about Seventy-three Thousand (\$73,000) Dollars as salary from said alleged corporation.

That plaintiff and cross-defendant has never received a salary from Investors Realty Corporation and Summit Realty Corporation, which were allegedly incorporated in 1945 and 1947 respectively.

That plaintiff and cross-defendant's duties, functions and [68] responsibilities for all of said alleged incorporations have remained the same since the date of the alleged incorporation of said alleged corporations.

That a reasonable salary, for plaintiff and cross-defendant, for services rendered to all the said alleged corporations during the marriage of the parties hereto was, at least, One Hundred Thousand (\$100,000.00) Dollars more than the salary actually received by said plaintiff and cross-defendant; that by the failure of the plaintiff and cross-defendant to authorize said corporations to pay him a reasonable salary he has been enabled to increase and

he did increase his alleged equity in the said alleged corporations by at least One Hundred Thousand (\$100,000.00) Dollars, through increase of reserves and surplus in said alleged corporations.

VI.

That in addition to the community property referred to in Paragraph IV and V of this amended cross-complaint defendant and cross-complainant is informed and believes and alleges upon such information and belief that the net increase in plaintiff and cross-defendant's equity in the five alleged corporations, since April 11, 1940, has been Two Hundred and Fifty Thousand (\$250,000.00) Dollars; that such increase in said equity is community property of the parties hereto.

That all of said alleged corporations were, since their alleged creation and during the entire period of the marriage of the parties hereto, and now are, mere devices and instruments through which plaintiff and cross-defendant carried on and carries on his business; that plaintiff and cross-defendant has, at all of said times, had complete control and management of and governed and controlled all of said alleged corporations; That failure of the above entitled court to disregard the alleged separate entity of all of said alleged corporations would result in a grave injustice to defendant and cross-complainant and their recognition by the above entitled court, would [69] be highly inequitable; that all of said corporations, at all of said times, have been used, by plaintiff and cross-defendant in an attempt to circumvent the community property laws of the State of California.

That there was, at all times mentioned herein, such a unity of interest and ownership between the plaintiff and cross-defendant and all of said alleged corporations that

separateness of said plaintiff and cross-defendant and of said alleged corporations never existed or it ceased to exist at all times mentioned herein; That the unity of interest and ownership between plaintiff and cross-defendant in all of said alleged corporations is so complete that the failure to disregard the alleged separate entity of said corporations would sanction fraud or promote an injustice against defendant and cross-complainant.

VII.

That defendant and cross-complainant is without means with which to support herself or with which to maintain, prosecute and defend this action; the only separate property she has is as follows:

- (a) 1947 Cadillac;
- (b) Personal effects;
- (c) Some household furniture and furnishings.

That plaintiff and cross-defendant is regularly employed and in business for himself and is well able to pay for said costs; that his annual income for the past fifteen years has averaged Forty-five Thousand (\$45,000.00) Dollars.

VIII.

That since the marriage of said cross-complainant and cross-defendant, the said cross-defendant, in utter disregard of his marriage vows, duties and obligations to cross-complainant herein, has been guilty of extreme cruelty toward cross-complainant and has treated cross-complainant in a cruel and inhuman manner and has wrongfully and, without cause, inflicted upon cross-complainant grievous mental and physical suffering as more particularly charged, alleged and set forth as follows: [70]

(a) That on divers and many occasions, the cross-defendant has struck cross-complainant with his hands and thereby inflicted physical injury upon cross-complainant herein.

(b) That in the presence of servants, the cross-defendant has on divers and many occasions struck the cross-complainant with his hands and thereby inflicted upon the cross-complainant great physical injury and thereby embarrassed and humiliated cross-complainant before said servants.

(c) That in the presence of mutual friends of the parties hereto and in the presence of servants, the cross-defendant has, without cause, on many and divers occasions, engaged in unwarranted and irritating repetitious arguments with cross-complainant while the latter was very seriously ill and the cross-defendant was under the influence of intoxicating liquors and thereby embarrassed and humiliated cross-complainant before said friends and servants.

(d) That cross-defendant, knowing that cross-complainant was seriously ill and had undergone three (3) major operations within the past year attempted to aggravate her illness and delay her recovery by saying, on divers and many occasions, the following:

- (I) "You poor, miserable creature."
- (II) "You have cancer and you cannot recover."
- (III) "You haven't a chance to get well."
- (IV) "If I had my way I would give you an overdose."
- (V) "I cannot afford to pay all these medical bills."

(e) That cross-defendant on divers and many occasions drank to excess and upon becoming drunk would torment and irritate cross-complainant, although he was well aware of her serious physical condition.

(f) That cross-defendant intentionally and continuously was slamming doors to upset cross-complainant and thus delay [71] or prevent her recovery from said illness.

(g) That cross-defendant on divers and many occasions and while under the influence of intoxicating liquors would, in the presence of mutual friends and the servants, unnecessarily and without cause, complain of the cost of cross-complainant's medical bills and the cost of running the household, and thereby embarrassed and humiliated cross-complainant before said friends and servants.

(h) That cross-defendant has, on divers and many occasions, refused to take cross-complainant on boat trips and other week-end trips he was planning to take and which he took.

IX.

That the foregoing and above acts of cruelty are only a few of the acts wilfully and wrongfully inflicted by the cross-defendant upon cross-complainant and as a result therefrom cross-complainant has suffered great and grievous mental and physical cruelty, embarrassment and deep humiliation, and it has made the marital relation with cross-defendant no longer tolerable.

X.

That said acts have been done without the connivance and collusion of this cross-complainant.

Wherefore, defendant and cross-complainant prays judgment of the above named court as follows:

(a) That plaintiff and cross-defendant take nothing by his action herein;

(b) That defendant and cross-complainant may live separate and apart from the plaintiff and cross-defendant;

(c) That plaintiff and cross-defendant be ordered to pay to defendant and cross-complainant a reasonable sum for her support and maintenance both during the pendency of this action and permanently thereafter; [72]

(d) That plaintiff and cross-defendant be ordered to pay defendant and cross-complainant reasonable attorneys' fees and court costs, including the cost of investigators and accountants used for the purpose of determining the community interest of the parties hereto;

(e) That plaintiff and cross-defendant be enjoined and restrained from selling, transferring, hypothecating or in any manner incumbering or disposing of the community or separate property hereinbefore referred to;

(f) That plaintiff and cross-defendant be enjoined and restrained from molesting or interfering with the defendant and cross-complainant;

(g) That defendant and cross-complainant be given all the community property of the parties hereto;

(h) For such other and further relief as to this court may appear meet and proper in the premises.

WATERS, ARDITTO AND WATERS

By James J. Ardito

Attorneys for Defendant and Cross-Complainant [73]

[Verified.] [74]

Received copy of the within this 5th day of June, 194..... J. Edmund Haley, Attorney for Ptf. & C. Def. [75]

“EXHIBIT B”

Waters, Arditto and Waters
621 Roosevelt Building
727 West 7th Street
Los Angeles, California
Attorneys for Defendant
Phone: MAdison 6-5133

In the Superior Court of the State of California in and for the County of Los Angeles.

Everett S. Shipp, Plaintiff, vs. Elaine Shipp, Defendant.
No. D 356,410.

AMENDED ANSWER

Now Comes Defendant Elaine Shipp and by stipulation of the parties hereto through their respective attorneys, files her amended answer to plaintiff's complaint herein and admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraphs I, II, and III of the complaint.

II.

Denies the allegations contained in paragraph IV of the complaint.

III.

Denies generally, specifically and positively each, all and every allegation, *atter* and thing contained in paragraph V of the complaint.

IV.

Denies generally, specifically and positively, each, all [76] and every allegation, matter and thing contained in

paragraph VI of the complaint, except that the defendant admits that she is residing at 641 Toyopa Drive, Pacific Palisades, California.

V.

Denies that she has committed, performed or engaged in any acts which would induce or justify the Court to order the defendant to move and vacate 641 Toyopa Drive as alleged in paragraph VII of the complaint.

VI.

Denies that she, a woman of ninety pounds, has made any physical or any other kind of threats toward defendant, a man of two hundred pounds, all as alleged in paragraph VIII of the complaint.

By Way of Affirmative Answer Defendant Alleges as Follows:

I.

That the following property was acquired after said parties had intermarried and said property was acquired with community funds and is community property:

(1) All the shares of stock in the following *alleges* corporations:

- (a) Investors Realty Corporation;
- (b) Summit Realty Corporation.

(2) The following shares of stock of the following alleged corporations:

- (a) 2500 shares in Metropolitan Finance Corporation of California;
- (b) 1500 shares in Metropolitan Finance Corporation;
- (c) 1500 shares in Chesley Finance Corporation.

(3) The following automobiles:

- (a) Dodge Sedan;
- (b) Mercury Coupe;
- (c) Oldsmobile Sedan;
- (d) Dodge Truck. [77]

(4) Bank deposits in the following banks:

- (a) California National Bank, Santa Monica;
- (b) Citizens National Trust and Savings Bank of Los Angeles;
- (c) Security-First National Bank of Los Angeles;
- (d) Bank of America National Trust and Savings Association.

(5) Home of the parties hereto at 641 Toyopa Drive, Pacific Palisades, California.

(6) Furniture and furnishings in the home of the parties hereto at said 641 Toyopa Drive, Pacific Palisades, California, except the following which is defendant's separate property:

- (a) Oriental rug in living room;
- (b) Bedroom set in her bedroom;
- (c) Coo-coo clock in entrance of home;
- (d) Chinese rose colored rug in dining room;
- (e) Sheffield Tea and Coffee Service in dining room;
- (f) Various sterling silver pieces.

(7) Insurance and annuity policies.

(8) Stocks, bonds and money.

(9) Jewelry, except the jewelry which has been given to defendant as her own separate property.

(10) A note secured by Deed of Trust on the home and lot situated at 176 Fuller Street, Los Angeles, California.

(11) Club membership in the following clubs:

- (a) Los Angeles Athletic Club;
- (b) Los Angeles Country Club;
- (c) Del Mar Country Club.

II.

That in addition to the community property listed in paragraph I of this Affirmative Answer, defendant has been informed and believes and upon such information and belief alleges that the [78] community property in an amount of One Hundred Thousand (\$100,000.00) Dollars was accumulated during the marriage of the parties hereto under the following circumstances:

That plaintiff during the marriage of the parties hereto had complete control and management of the following alleged corporations and owned and owns the following amount of stock in said alleged corporations and held and holds the following positions in said alleged corporations:

<u>Corporations</u>	<u>Stock Owned</u>	<u>Position Held</u>
Metropolitan Finance Corporation	85%	President and General Manager and Director
Metropolitan Finance Corporation of California	85%	"
Investors Realty Corporation	100%	"
Chesley Finance Corporation	96%	"
Summit Realty Corporation	100%	"

That during the eight (8) years immediately preceding the marriage of the parties hereto the plaintiff received a total salary of Forty-six Thousand, Five Hundred (\$46,500.00) Dollars from Metropolitan Finance Corporation; that during the approximate eight (8) years of the marriage of the parties hereto, he has received from said alleged corporation a salary of Nine (\$9.00) Dollars.

That prior to the marriage of the parties hereto plaintiff also received an annual salary of Nine Thousand (\$9000) Dollars a year from Chesley Finance Corporation; that since 1942 he had been receiving an annual salary of Forty-two Hundred (\$4200.00) Dollars from said alleged corporation.

That for the eight (8) years, immediately preceding the marriage of the parties hereto, plaintiff received about Eighty Thousand (\$80,000) Dollars as salary from the Metropolitan Finance Corporation of California; that during the eight (8) years the parties hereto have been married plaintiff has received about Seventy-three Thousand (\$73,000) Dollars as salary from said alleged corporation. [79]

That plaintiff has never received a salary from Investors Realty Corporation and Summit Realty Corporation, which were allegedly incorporated in 1945 and 1947 respectively.

That plaintiff's duties, functions and responsibilities for all of said incorporations have remained the same since the date of the alleged incorporation of said alleged corporations.

That a reasonable salary, for plaintiff for services rendered to all the said alleged corporations during the marriage of the parties hereto was, at least, One Hundred

Thousand (\$100,000.00) Dollars more than the salary actually received by said plaintiff; that by the failure of the plaintiff to authorize said corporations to pay him a reasonable salary he has been enabled to increase and he did increase his alleged equity in the said alleged corporations by at least One Hundred Thousand (\$100,000.00) Dollars, through increase of reserves and surplus in said alleged corporations.

III.

That in addition to the community property referred to in paragraphs I and II of this Affirmative Answer, defendant is informed and believes and alleges upon such information and belief that the net increase in plaintiff's equity in the five alleged corporations, since April 11, 1940, has been Two Hundred and Fifty Thousand (\$250,000.00) Dollars; that such increase in said equity is community property of the parties hereto;

That all of said alleged corporations were, since their alleged creation and during the entire period of the marriage of the parties hereto, and now are, mere devices and instruments through which plaintiff carried on and carries on his business; that plaintiff has, at all of said times, had complete control and management of and governed and controlled all of said alleged corporations; that failure of the above entitled court to disregard the alleged entity of all of said alleged corporations would result in a grave injustice to defendant and their recognition, by the above entitled court, would be [80] highly inequitable; that all of said corporations, at all of said times, have been used, by plaintiff in an attempt to circumvent the community property laws of the State of California.

That there was, at all times mentioned herein, such a unity of interest and ownership between the plaintiff and

all of said alleged corporations that separateness of said plaintiff and of said alleged corporations never existed or ceased to exist at all times mentioned herein. That the unity of interest and ownership between plaintiff and all of said alleged corporations is so complete that the failure to disregard the alleged separate entity of said corporations would sanction fraud or promote an injustice against defendant.

IV.

That since the marriage of said plaintiff and defendant the said plaintiff, in utter disregard of his marriage vows, duties and obligations to defendant herein, has been guilty of extreme cruelty toward defendant and has treated defendant in a cruel and inhuman manner and has wrongfully and, without cause, inflicted upon defendant grievous mental and physical suffering more particularly charged, alleged and set forth as follows:

(a) That on divers and many occasions, the plaintiff has struck defendant with his hands and thereby inflicted physical injury upon defendant herein.

(b) That in the presence of servants, the plaintiff has on divers and many occasions struck the defendant with his hands and thereby inflicted upon the defendant great physical injury and thereby embarrassed and humiliated defendant before said servants.

(c) That in the presence of mutual friends of the parties hereto and in the presence of servants, the plaintiff has, without cause, on many and divers occasions, engaged in unwarranted and irritating repetitious arguments with defendant while the latter was very seriously ill and [81] the plaintiff was under the influence of intoxicating liquors and thereby embarrassed and humiliated defendant before said friends and servants.

(d) That plaintiff, knowing that defendant was seriously ill and had undergone three (3) major operations within the past year attempted to aggravate her illness and delay her recovery by saying, on divers and many occasions the following:

- (I) "You poor, miserable creature."
- (II) "You have cancer and you cannot recover."
- (III) "You haven't a chance to get well."
- (IV) "If I had my way I would give you an overdose."
- (V) "I cannot afford to pay all these medical bills."

(e) That plaintiff on divers and many occasions drank to excess and upon becoming drunk would torment and irritate defendant, although he was well aware of her serious physical condition.

(f) That plaintiff intentionally and continuously was slamming doors to upset defendant and thus delay or prevent her recovery from said illness.

(g) That plaintiff on divers and many occasions and while under the influence of intoxicating liquors would, in the presence of mutual friends and the servants, unnecessarily and without cause, complain of the cost of defendant's medical bills and the cost of running the household, and thereby embarrassed and humiliated defendant before said friends and servants.

(h) That plaintiff has, on divers and many occasions, refused to take defendant on boat trips and other week-end trips he was planning to take which he took. [82]

V.

That the above and foregoing acts of cruelty are only a few of the acts wilfully and wrongfully inflicted by the

plaintiff upon defendant and as a result therefrom defendant has suffered great and grievous mental and physical cruelty, embarrassment and deep humiliation, and it has made the marital relation with plaintiff no longer tolerable.

VI.

That said acts have been done without the connivance and collusion of defendant.

VII.

That defendant is without means with which to support herself or with which to defend this action; that the only separate property she has is as follows:

- (a) 1947 Cadillac;
- (b) Personal effects;
- (c) Some household furniture and furnishings.

That plaintiff is regularly employed and in business for himself and is well able to pay therefore; that his annual income for the past fifteen years has averaged Forty-five Thousand (\$45,000.00) Dollars.

Wherefore, defendant prays judgment of the above named court as follows:

- (a) That plaintiff take nothing by his action herein;
- (b) That plaintiff be ordered to pay defendant a reasonable sum for her support and maintenance during the pendency of this action and permanently thereafter;
- (c) That plaintiff be ordered to pay defendant's reasonable attorney's fees and court costs, including investigating and auditing costs relating to termination of community interests;
- (d) That plaintiff be enjoined and restrained from selling, transferring, hypothecating or in any manner

encumbering or [83] disposing of the property listed and hereinbefore referred to;

(e) That plaintiff be enjoined and restrained from molesting or interfering with the defendant;

(f) That defendant be given all of the community property of the parties hereto;

(g) For such other and further relief as to this court may appear meet and proper in the premises.

WATERS, ARDITTO AND WATERS

By James J. Arditto

Attorneys for Defendant [84]

[Verified.]

[Endorsed]: Filed Jun. 7, 1948. Edmund L. Smith, Clerk. [85]

[Title of District Court and Cause]

ORDER ON MOTION OF DEFENDANTS TO
DISMISS THE ACTION

This cause having heretofore come before the court for hearing on defendants' motion to dismiss the action, and the matter having been argued and submitted for decision; and it appearing to the court:

(1) that the plaintiff, Metropolitan Finance Corporation of California, a Delaware corporation, commenced this action on April 14, 1948, invoking the so-called diversity jurisdiction of this court to recover possession of one Cadillac automobile in accordance with the "claim and delivery" statutes of California [Calif. Code of Civ. Proc., §§509-521], or in the alternative to recover the value of the property, alleged to be \$4,000, if delivery cannot [86] be had;

(2) that on April 15, 1948, at the instance of plaintiff, the United States Marshal for this district took the automobile from the possession of defendant Elaine Shipp pursuant to §§509-512 of the California Code of Civil Procedure [Rule 64 F. R. C. P.] ;

(3) that prior to the commencement of this action a suit for divorce was commenced on March 4, 1948, in the Superior Court of the State of California, in and for the County of Los Angeles, by Everett S. Shipp, as plaintiff, against said Elaine Shipp, as defendant, and this state court action is still pending;

(4) that said Elaine Shipp has alleged in her answer and cross-complaint, filed in said divorce action on March 8, 1948, that the automobile in controversy was and is part of the community property of the marriage of said Everett S. Shipp and said Elaine Shipp;

(5) that in proceedings for divorce under the laws of California the Superior Court of the State of California has jurisdiction to hear and determine all matters relating to the status of property alleged to be community property; and, in order to exercise that jurisdiction with effect, the Superior Court necessarily assumes control of the property in controversy if situated within the state [Huber v. Huber, 27 Cal. (2d) 784, 167 P. (2d) 708 (1946); Salveter v. Salveter, 206 Cal. 657, 275 Pac. 801 (1929); Cal. Civ. Code, §§141-143, 146-149] ;

(6) that on March 8, 1948, when title and right [87] to possession of the automobile were put in issue by Elaine Shipp's answer and cross-complaint, the Superior Court of the State of California, in and for the County of Los Angeles, acquired constructive

possession of said automobile for the purpose of giving effect to the state court's adjudication of that issue [Penn General Casualty Co. v. Pennsylvania, 294 U. S. 189 (1935); United States v. Bank of New York & Trust Co., 296 U. S. 463 (1936)];

(7) that in cases where a state court holds prior actual or constructive possession of property in an in rem or quasi in rem proceeding, a federal district court has no jurisdiction to hear and determine a controversy involving possessory rights in the same res, the effective disposition of which by the federal court would result in interference with the administration of the res by the state court [Princess Lida v. Thompson, 305 U. S. 456 (1939); United States v. Bank of New York & Trust Co., *supra*, 296 U. S. 463; Penn General Casualty Co. v. Pennsylvania, *supra*, 294 U. S. 189; cf. Commonwealth Trust Co. v. Bradford, 297 U. S. 613 (1936)];

(8) that an alternative judgment of this court for the value of the automobile in question would not be proper in the case at bar because delivery can be had, the property being in the actual possession of the Marshal of this court [Claudius v. Aguirre, 89 Cal. 501, 26 Pac. 1077 (1891); Erreca v. Meyer, 142 Cal. 308, 75 Pac. 826 (1904); Webster v. Mountain Monarch Gold Mining Co., 6 Cal. App. (2d) 450, 44 P. (2d) 646 (1935)];

(9) that execution of any judgment of this court [88] in this action ordering delivery of the automobile to the plaintiff would interfere with the administration of that res by the Superior Court of California; and

(10) that this court lacks jurisdiction over the subject matter of this action because of the circumstances stated in (1) to (9) above;

It Is Ordered that the motion of defendants to dismiss the action for want of jurisdiction over the subject matter of the action be and is hereby granted; and counsel for defendants are directed to submit judgment of dismissal accordingly pursuant to local rule 7 within five days.

It Is Further Ordered that the Clerk this day forward copies of this order by United States mail to the attorneys for the parties appearing in this cause.

June 17, 1948.

WM. C. MATHES

United States District Judge

[Endorsed]: Filed Jun. 17, 1948. Edmund L. Smith, Clerk. [89]

In the District Court of the United States
Southern District of California
Central Division
No. 8130-WM

THE METROPOLITAN FINANCE CORPORATION
OF CALIFORNIA, a corporation,

Plaintiff,

vs.

ELLSWORTH WOOD, ELAINE SHIPP, JOHN
DOE and RICHARD ROE,

Defendants.

JUDGMENT OF DISMISSAL

This cause came on to be heard on the 7th day of June, 1948, and was argued by James J. Arditto, Counsel for

Defendants, and Henry Schaefer, Jr., Counsel for Plaintiff; and thereupon, upon consideration thereof and memorandum filed, on the 17th day of June, 1948, the Honorable William C. Mathes, District Judge of the above Court

Ordered that defendants' Motion to Dismiss this action, for want of jurisdiction over the subject matter of the action, be sustained; and

It Is Further Ordered, Adjudged and Decreed that this
 for lack of jurisdiction over the subject
 matter of the action [Mathes, J.]
 cause be and hereby is dismissed [^] and that defendants
 recover from plaintiff their costs herein expended.

Dated: June 22, 1948.

WM. C. MATHES
 District Judge

Judgment entered Jun. 23, 1948. Docketed Jun 23, 1948.
 Book 51, page 486. Edmund L. Smith, Clerk; by Louis
 J. Somers, Deputy. [90]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jun. 23, 1948. Edmund L. Smith,
 Clerk. [91]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice Is Hereby Given that The Metropolitan Finance Corporation of California, a corporation, plaintiff above named, hereby appeals to the Circuit Court of Appeals

for the Ninth Circuit from the Judgment of Dismissal entered in this action on June 23, 1948.

Dated: July 9, 1948.

MACFARLANE, SCHAEFER & HAUN

HENRY SCHAEFER, JR.

DEXTER D. JONES

WILLIAM GAMBLE

By Henry Schaefer, Jr.

Attorneys for Appellant, The Metropolitan Finance
Corporation of California

[Endorsed]: Filed & mld copy to Waters, Arditto &
Waters, attys for defts Jul. 13, 1948. Edmund L. Smith,
Clerk. [92]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 95, inclusive, contain full, true and correct copies of Complaint, Claim and Delivery; Separate Answers of Ellsworth Wood and Elaine Shipp; Notice of and Motion to Remand Cause to Superior Court in and for the County of Los Angeles, State of California or to Dismiss Cause; Affidavit in Support of Motion to Dismiss or Remand and

exhibits attached; Statement of Reasons and Opposition of Defendants' Motion to Remand Cause to Superior Court in and for the County of Los Angeles, State of California, or to Dismiss Action and Points and Authorities with exhibits attached; Counter Affidavit of Henry Schaefer, Jr., in Opposition of Motion to Dismiss or Remand; Supplemental Affidavit in Support of Defendants' Motion to Remand or to Dismiss the Above-entitled Action and exhibits attached; Order on Motion of Defendants to Dismiss the Action; Judgment of Dismissal; Notice of Appeal and Designation of Record on Appeal which, together with copy of reporter's transcript of proceedings on June 7, 1948, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$24.50 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 28 day of July, A. D. 1948.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke
Chief Deputy.

[Title of District Court and Cause]

Honorable William C. Mathes, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Monday, June 7, 1948

Appearances:

For the Plaintiff: Macfarlane, Schaefer & Haun, by
Henry Schaefer, Jr., Esquire.

For the Defendants: Waters, Arditto & Waters, by
James J. Arditto, Esquire.

Los Angeles, California, Monday, June 7, 1948

10:00 A. M.

(Case called by the clerk.)

Mr. Arditto: May it please the court, this proceeding that we have filed is designated a motion to remand or dismiss. I think it may be well to have a brief resume of the background in this proceeding and the state court proceeding. These facts are all set forth in the various affidavits on file.

In the early part of March of this year, Elaine Shipp, who is the defendant in this Metropolitan case pending here, filed a suit for a divorce from her husband, Everett Shipp. She filed an answer and a cross-complaint asking for separate maintenance and denying the grounds for divorce on the part of Mr. Shipp. A few days later she asked the Department 8 of the Superior Court here in Los Angeles County for an injunction and restraining order restraining Mr. Shipp from, among other actions, of interfering with her possession of a 1947 Cadillac automobile.

The order was issued. It is attached to my original affidavit which is on file herein as Exhibit C.

I might ask counsel at this time if he has received a copy of that Exhibit C? I think, by inadvertence, at the time I served it, you stated it was left off of your copy.

Mr. Schaefer: Yes; I have received it. [2*]

Mr. Arditto: May I ask the court if my Exhibit C is attached to the original and copy that I filed with the court?

The Court: What does Exhibit C consist of?

Mr. Arditto: Exhibit C, it is an order signed by the Honorable Orlando H. Rhodes on March 9, 1948.

The Court: Is that this order to show cause on a printed form?

Mr. Arditto: That is right.

The Court: Yes; it is attached.

Mr. Arditto: That order provides, as I said, among other things that Mr. Shipp was enjoined from interfering with the use and possession by Mrs. Shipp of this 1947 Cadillac.

Thereafter, the state court, by that action, by the filing of the complaint, the cross-complaint, and the injunction, it is our contention that the Superior Court in and for Los Angeles County acquired jurisdiction of this automobile because, among other things pleaded in the complaint, is the fact that that Cadillac is alleged as being part of the community property of the parties, Mrs. Shipp and Mr. Shipp.

The Court: Let me interrupt you here. I notice a stipulation in the file; I signed an order on it May 21st,

*Page number appearing in original Reporter's Transcript.

continuing this hearing until June 21st. Are all parties here? [3]

Mr. Arditto: Yes.

Mr. Schaefer: Yes, sir.

Mr. Arditto: May it please the court, that stipulation is a continuation of the pre-trial proceedings and it was asked for and agreed upon by the parties hereto because we wanted to argue this motion before continuing with the pre-trial.

The Court: It does not cover the motion. Yes; I see now. Your theory is, then, that the state court acquired jurisdiction of the res prior to bringing this action?

Mr. Arditto: That is correct. And we say that the Superior Court in and for the County of Los Angeles acquired jurisdiction over this Cadillac automobile at least 33 days before this action was commenced.

At this point I would like to ask the court's permission to file a supplemental affidavit which I have just, half an hour ago, served on Mr. Schaefer, counsel for the plaintiff herein. I do not believe he has any objection to the filing of it.

The Court: Will you hand it to the clerk? Is there objection to the affidavit being filed and being considered as in support of the motion?

Mr. Schaefer: I have no objection, your Honor. I obviously have not had a chance to answer it or file a [4] counter-affidavit. I have not had an opportunity to check some of the things that are asserted there about stock holdings, but I haven't any objection to the filing of it.

The Court: Is there any question as to the facts with respect to the Superior Court litigation?

Mr. Schaefer: No, your Honor. I believe the facts are stated correctly.

Mr. Arditto: I do not believe there is any dispute except possibly as to stock holdings. Mr. Schaefer in his affidavit alleged that Mr. Shipp only owns 4042. some-odd fractional number of shares of Metropolitan Finance Corporation of California. We, in our original affidavit, set forth that he owned, as I recall, 76 per cent.

The filing of this supplemental affidavit has as its purpose (1) definitely clarifying the facts, as we have set forth on page 2 of the supplemental affidavit, that Mr. Shipp owns at least 81 per cent of the stock of the plaintiff here, either directly or through his stock holdings and for other corporations which, as disclosed by our Exhibit E, which was filed several weeks ago, Mr. Shipp owns either 96 per cent of the stock of those corporations or 80 per cent.

Another purpose of filing this supplemental affidavit is to call the court's attention to the fact that on Friday of last week we filed an amended answer and an amended [5] cross-complaint in the Superior Court proceeding, where we clearly set forth our contention in effect that the corporate entities—this plaintiff as well as these other four corporations that are referred to in the various affidavits that are on file here—should be disregarded because they are in effect mere devices or instruments under which or by which Mr. Shipp carries on or does his business.

The Court: May this court upon motion to remand, where jurisdiction is invoked based upon diversity of citizenship, examine into the corporate entity and determine whether or not the corporation is an alter ego of some individual who is resident in another state?

Mr. Arditto: I believe so, may it please the court, where, as in this case, the husband and wife, the real true parties of all this proceeding, have brought themselves within the jurisdiction of the Superior Court here in the state.

The Court: That is an entirely different ground. There are two grounds as I understand you are alleging: One is that this action in this court, where jurisdiction is invoked based upon diversity of citizenship, is essentially an action in rem, being a claim in delivery and replevin.

Mr. Arditto: That is right; it is an action to quiet title.

The Court: In nature of an action of replevin; that [6] the proceeding in the Superior Court for divorce, involving this same automobile and other property, is such that the Superior Court has jurisdiction in rem to determine title and divide the property, if necessary, or to award it to one or both parties.

Mr. Arditto: I think that is well established.

The Court: And for that reason the state court has prior jurisdiction of the res involved. Now, you assert another ground, as I understand, and that is that this court should now look behind the corporate entity of the plaintiff and find there, instead of a Delaware corporation, a California citizen.

Mr. Arditto: Well, I beg the court's pardon if I have confused it in any manner. I am not making that contention at this time. My contention is based solely—

The Court: I do not see the applicability of the stock ownership question, then.

Mr. Arditto: Well, the reason for calling this court's attention at this time to the amended answer and amended

cross-complaint in the state court proceedings was in recognition of several contentions set forth by the plaintiff herein in his opposition, wherein he alleges that the question of disregard of corporate entity is not in issue in this proceeding. I wanted to make sure that the court's attention was called to the fact that that very issue is [7] one of the issues pending before the Superior Court here in Los Angeles County; and if we are successful therein piercing the corporate veil or in proving that this property is the separate property of Mrs. Shipp, our client, that every issue and every question that can possibly be decided by this court has already been in effect placed in issue in the Superior Court here in Los Angeles County prior to the time this particular action was commenced.

I believe the court is familiar with the usual rule in regard to the acquisition of jurisdiction by the state court in these divorce proceedings, where the parties put in issue the property but, with the court's indulgence, I would like to read a case. I am quoting from *Spahn v. Spahn*, 70 Cal. App. (2d), 791, and my quotation begins on page 796.

"* * * 'Where the property rights are put in issue in a divorce proceeding, either by specific allegations describing such property, or by allegation that no community property existed, the decree is res judicata of such rights.' In the same case at page 681 the rule is stated as follows: 'It may be taken as settled that the jurisdiction of the court in a divorce proceeding over property rights is limited to the property which belongs to the community or which [8] is the separate property of the spouses.'"

I think the most telling language is here, in *Marshall v. Marshall*, 138 Cal. App. 706, 707, the court said:

“ ‘The issue as to the property having been fairly made and by both parties submitted to the court for determination, the court had jurisdiction to determine the question involved as to the character of the property and to quiet the title of the rightful owner thereto.’ ”

In other words, this case, I believe counsel will agree, states the usually acceptable rule in the state courts, and that is, in a divorce proceeding, once the parties place in issue the various property rights, whether it be community property or separate property, that the court in effect proceeds, in effect, the same as though it were a quiet title proceeding insofar as respective rights of the parties to the property is concerned.

That is exactly what we have here. 33 days before the commencement of this particular action the title to this Cadillac automobile that is the subject matter of this Metropolitan Finance action we are arguing here today was brought within the jurisdiction of the Superior Court here in Los Angeles County by the pleadings; and then, to make it stronger, we proceeded to receive for Mrs. Shipp an injunction and restraint against Mr. Shipp from interfering [9] with her use and possession of this automobile. And we contend that what this proceeding is is an attempt to avoid that injunction and restraint on the part of the Superior Court.

The Court: Have you any authority for this court, upon a motion to remand, to inquire whether or not the Metropolitan Finance Corporation of California, a Dela-

ware corporation, is the same as—what is the individual's name?

Mr. Arditto: E. S. Shipp.

The Court: —E. S. Shipp?

Mr. Arditto: No. But our affidavits set forth—

The Court: Then this is an action, is it not, involving the claim of the third party to this res?

Mr. Arditto: That is exactly it.

The Court: And it is the duty of this court, then, under those circumstances, if jurisdiction of this court is properly invoked, to respect as a matter of comity the orders of the State Court with respect to the res but, nevertheless, to proceed with this litigation.

Mr. Arditto: Well, we are in this position. We have set forth in our affidavit this action was commenced at the instance and request of E. S. Shipp. Set forth in our affidavits, Mr. Shipp is the owner of at least 81.7 per cent of the stock of the alleged corporation. [10]

The Court: The question is: May we inquire into that upon this motion to remand? That all might very well appear upon a trial of the merits.

Mr. Arditto: I believe so, may it please the court, because this court, I think we will all agree, does not have jurisdiction if the State Court acquired jurisdiction of the subject matter of this action prior to the time that this action was commenced.

The Court: The State Court does not purport to have jurisdiction over anything more, does it, than the claims of the two individuals to this automobile? The State Court does not purport to exercise any jurisdiction over the claim of this plaintiff here as a separate corporate entity to the automobile.

Mr. Arditto: That is correct; but the main issue here and the main issue in the State Court and the subject matter of the action here and the subject matter of the action in the State Court action is exactly the same.

The Court: Well, it is an automobile and it happens to be the same automobile.

Mr. Arditto: And the parties are exactly the same.

The Court: That is the question. If you can show me some precedent which will enable me to go into that matter, I will be glad to consider it. But the plaintiff here is a foreign corporation on the face of it, and that foreign [11] corporation has chosen this court, invoking the diversity of jurisdiction of this court in this action.

Now, the question is whether the plaintiff shall be denied access to this court in this action. It is not a removable case.

Mr. Arditto: No. It is a motion to dismiss, actually.

The Court: If you wish to look at some authorities on that question, I will go into the matter of whether or not the plaintiff is the same as some individual citizen of California, namely, Shipp. Do you wish to make some further search into it?

Mr. Arditto: No. I am satisfied that I can't go any farther than we have in our affidavits, setting forth the—

The Court: Have you looked into the question of whether or not I may consider these affidavits upon this motion? In other words, can this court, when a foreign corporation comes here and says it is a corporation chartered under the laws or created by the laws of a certain state and is, therefore, under the holdings of the Supreme Court, to be deemed for these purposes a citizen of that state, may this court take testimony and say: "Ah! But that is a fake. You are really Joe Doakes, a citizen of

California;” or must the court admit for jurisdictional purposes the facts of the creation? It is all a fiction, anyhow.

Mr. Arditto: Well, of course I feel that there isn’t any question of our right to set forth by affidavits the [12] facts as we have set them forth. Now, whether those facts—

The Court: In many affidavits it is a very silly fiction. There are some corporations that come into this court and invoke the jurisdiction of this court who do 99.44 per cent of their business in the State of California. There are corporations which are organized under the laws of some states and probably do not do \$10.00 worth of business under the laws of that state, but they invoke the diversity jurisdiction of this court, and the Supreme Court of the United States has said they may do so and I am bound by that precedent. If you have any authorities to go behind the fact of incorporation, I will be glad to entertain them.

Mr. Arditto: You still have the fundamental principle, as I understand it, and supported by the cases that we have cited in our memorandum in support of our motion to dismiss, to the effect that where the State Court acquires jurisdiction of the subject matter of the action in an action in rem prior to the time that the Federal Court has acquired jurisdiction, that the State Court’s jurisdiction is paramount. I mean, fundamentally, nothing can be decided in this case that can’t be decided in the State Court, and that is the reason for the rule.

The Court: Yes; and that would be true in most cases, would it not, but this plaintiff says, “I am a citizen of another state; the Constitution says that I am not required [13] to litigate my controversies with a citizen

of California in the courts of California; I am entitled to litigate them in the Federal Court."

Mr. Arditto: Well, we are in this position: In the State Court and in this court, among other issues that will be determined, assuming this court continues in its jurisdiction as well as the State Court, will be a decision relating to whether this is, in fact, as between these parties a corporation or not, or whether it is a mere fiction through which Mr. Shipp carries on his business.

The Court: That may all well come to pass upon a trial of the merits. Do you have anything further to add with respect to this motion?

Mr. Arditto: Not a thing.

The Court: Do you have anything in addition to what is pointed out in your authorities, Mr. Schaefer?

Mr. Schaefer: I want to point out one additional fact, your Honor. As your Honor stated, this is an action of the Metropolitan Finance against Ellsworth Wood and Elaine Shipp, and the State Court action is Mr. Shipp against Mrs. Shipp. The answer filed in this action by Ellsworth Wood, who is the brother of Elaine Shipp, the verified answer, claims that he is the owner of the car. He is not a party to the State action.

The Court: Well, that would not matter, would it, if [14] the State action could be construed to be one in rem?

Mr. Schaefer: But the Metropolitan Finance Corporation is not a party to that action and has filed an opposition here to set forth in exhibit form all the documents concerning this car, showing the original payment some two years ago by its check—your Honor has my position there—shows the receipt issued in its name and, for the purpose of this motion, the affidavit must be taken as true.

They have set forth the ownership in the car, a complete chain of title.

The only allegation in the answer of Elaine Shipp is to the effect that it was put into the name of that corporation for the purpose of evading taxes.

I have a recent authority I would like to cite to your Honor on that.

The Court: There is no need of considering that at this point, is there?

Mr. Schaefer: Very well, your Honor.

The Court: The question here is purely a jurisdictional one, and it seems to me it involves two points: One, is the State Court action an action in rem involving this automobile? Two, is whether this court, upon motion to dismiss for the want of jurisdiction, may look behind the corporate entity to determine whether the corporation is in fact the alter ego of the citizen different from the state under the laws of which it was chartered. [15]

Mr. Schaefer: As I see it, the court would adjudicate the rights of the plaintiff and this corporation unless plaintiff is a party to that state court action.

The Court: Of course it could if the plaintiff is the alter ego of one of the parties.

Mr. Schaefer: That is not alleged in this action.

The Court: Have you looked into the question of whether or not this court can inquire as to whether or not there is separate corporate entity upon a challenge to the diversity of jurisdiction here?

Mr. Schaefer: As to this phase of it, your Honor, we have set forth in an affidavit the ownership of Mr. Shipp, having 4,000 shares in a total of some 25,000 shares; and for the purposes of this motion I believe that affidavit has to be considered as correct. So I do not see there

is even a question of diversity raised or a question of alter ego raised.

The Court: I will submit the matter, gentlemen. I am very favorably inclined to resolving this fiction which enables a corporation to do 99 per cent of its business in the state and yet escape the burden of the duty of submitting its controversy to adjudication in the courts of the state. They come in here and get the benefit of the Government paying the jury fees in jury cases; they get the benefit of the unanimous verdict, as against a verdict of nine in [16] the State Court; they come here and get the benefit of the rule which prohibits this court from ordering a remittur rather than a new trial in cases where damages are deemed excessive, but I am bound by precedent.

I will submit the matter.

Mr. Schaefer: I have two cases I would like to submit, your Honor, on the point that you have stated: *Relley v. Campbell*, 134 Cal. 175; and *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210.

The Court: What do those have to do with the nature of the proceeding in the State Court?

Mr. Schaefer: They have to do with the fact that it must be not only alleged, but until the facts appear by proof in a trial—

The Court: I want to understand you.

Mr. Schaefer: —it must be established by evidence in a trial as to the overthrow of the corporate entity and the alter ego of the person, and not by affidavit.

The Court: Anything further, gentlemen?

Mr. Arditto: If I may just take about another minute of the court's time. As long as the court is going to submit this matter, I would like to submit a brief statement

or a brief memorandum on this question of whether the state action is an action in rem. I think that is so clear that I am surprised that counsel for the plaintiff does not stipulate [17] to that, but as long as he does not, I would like to brief it for the benefit of the court.

In regard to Ellsworth Wood's interest in this thing, the pleading is clear that he has only a remainder interest; in other words, that Mrs. Shipp is the owner of this car during her life.

May I have five or 10 days?

The Court: Three days?

Mr. Arditto: All right.

Mr. Schaefer: May I have a like amount to answer?

The Court: I will submit the motion upon the memoranda of both sides which may be filed within three days concurrently.

[Endorsed]: Filed Jul. 13, 1948. Edmund L. Smith, Clerk. [18]

[Endorsed]: No. 12003. United States Circuit Court of Appeals for the Ninth Circuit. The Metropolitan Finance Corporation of California, a corporation, Appellant, vs. Ellsworth Wood and Elaine Shipp, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed July 31, 1948.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 12003

THE METROPOLITAN FINANCE CORPORATION
OF CALIFORNIA, a corporation,

Appellant,

vs.

ELLSWORTH WOOD, ELAINE SHIPP, JOHN
DOE and RICHARD ROE,

Appellees.

POINTS AND DESIGNATION OF TRANSCRIPT
UNDER RULE 19, SUBDIVISION 6

Pursuant to Rule 19, subdivision 6, the Appellant hereby makes its statement of points relied upon and designation of the portion of transcript to be printed in support of such points.

POINT I

The Judgment of the Court in dismissing the action on the grounds that the District Court lacked jurisdiction of the subject matter is not sustained by the law.

Portions of the transcript designated to be printed:

* * * * *

Dated: August 19, 1948.

MACFARLANE, SCHAEFER & HAUN
HENRY SCHAEFER, JR.

DEXTER D. JONES
WILLIAM GAMBLE

By William Gamble

Attorneys for Appellant

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 20, 1948. Paul P. O'Brien,
Clerk.

